

"Perestroika or Just Perfunctory? The Scope and Significance of Russia's New Legal Ethics Laws."

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One must rule the advocate with an iron hand and keep him in a stage of siege, for this intellectual scum often plays dirty.

Vladimir I. Lenin

I place particular importance on the fundamental role of the law, which is the cornerstone of our state and our civil society. We must ensure true respect for the law and overcome the legal nihilism that is such a serious hindrance to modern development.

President Dmitry Medvedev

I. INTRODUCTION

Democratic political spheres and evolving capitalist markets require the security of both individual personal and property rights. This is accomplished through laws, enforcement mechanisms, and lawyers who advise their clients how to navigate within new laws to ensure sustainability of enterprises and protection of civil rights. However, following and using the law for such security is not automatic; it requires a proper legal culture and trust in the legal profession. Professional ethics provide a foundation for such trust and are molded to regulate and guide the legal field, ensuring client and societal trust in the legal profession. In order to trace, understand and explain the development of legal ethics in a given country, it is critical to

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analyze the issue not by just looking purely at the newly-enacted attorney regulations, but rather by approaching it from the historic, socio-economic and moral perspective since professional ethics very much reflect the current values, state of development and moral principles of a given society. Specifically, today's status of ethical guidelines for the legal profession in Russia is greatly a reflection of the country's rich and fascinating history with its changing political regimes, economic structure and societal values.

The legal profession has “not traditionally been accorded much power or status in Russia”² and has undergone many changes in the past. This article outlines three major periods in the profession's development: first, from 1864-1917; second, from 1917-1991; and third, from 1991 to the present time. The first period is marked by the abolishment of serfdom and accompanying legal reforms; the second one begins with the Great October Socialist Revolution of 1917 and the enactment of the Soviet state; finally, the last period was started by Perestroika and the fall of the Soviet Union in 1991, and it is still in progress today as the legal profession in Russia continues to grow closer to its western counterparts.

This article will introduce into legal scholarship for the first time a discussion and analysis of rules that were laid down in Spring 2002 in a federal law – “On Work as an Attorney and the Legal Profession in the Russian Federation”³ (hereinafter “On Work”) – and in the Code of Professional Ethics for the Attorney (“Code”), that was adopted in 2003 and later amended in

² GORDON SMITH, REFORMING THE RUSSIAN LEGAL SYSTEM 1 (1996). Somewhat more recent Russian articles comment that advocates under the Soviet system were known for “play[ing] dirty.” Simona Pipko & Roman Pipko, *Inside the Soviet Bar: A View from the Outside*, 21 INT'L LAW. 853 (1987). As one author explains, “[s]uch comments in a Soviet journal hardly offend[ed] many readers and apparently easily pass[ed] the censorship of the editors because the status of an advocate in the USSR generate[d] mistrust and suspicion of both the government and its subjects.” *Id.* Feelings of animosity may also have resulted from the higher level of advocates' wages and the fact that, in the past, advocates' names were predominately Jewish. *Id.*

³ Ob advokatskoi deyatel'nosti i advokature v Rossi'skoi Federatsii [On Work as an Attorney and the Legal Profession in the Russian Federation] 2002, No. 63-FZ [hereinafter On Work], *translated in* STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, May-June 2008, at 10, 10-53 [hereinafter STATUTES & DECISIONS May-June 2008].

2007.⁴ Since then, that law and the Code together constitute the basis for the ethical practice of law in Russia. These laws were then translated and became available in English. Although these new laws represent a significant step toward the development, independence and uniformity of the legal profession in Russia, one of the biggest challenges lies in the fact that they only apply to a certain part of the profession—members of the “advokatura” or advocates—with jurists remaining unregulated. A failed attempt to impose that type of regulation on jurists definitely shows that the idea of ethical regulation of lawyers aimed at establishing their independence of judgment is still new and fragile in Russia.

This article further examines the current structure, status and regulation of the legal profession in Russia by providing a comparative analysis of selected rules and applicable provisions of the Model Rules of Professional Conduct⁵ enacted by the American Bar Association (“ABA Model Rules”) and the Code of Conduct of European Lawyers (“CCBE Code”)⁶ adopted at the CCBE Plenary Session.⁷ The gist of this analysis attempts to compare the purpose and affect of enforcing attorney ethics rules in Russia, Europe and the United States with a focus on looking at lawyering through the prism of either a standard business venture or an independent profession.

An added challenge to any analysis of Russian law or resulting legal system discussed in this article is the country’s historic distrust and disrespect for the law that was “typical during Soviet times and continues into the current legal framework.”⁸ In fact, one scholar believes that

⁴ КОДЕКС ПРОФЕССИОНАЛЬНОЙ ЭТИКИ АДВОКАТА [hereinafter KPEA] [Code of Professional Ethics for the Attorney] (Russ.), *translated in* STATUTES & DECISIONS May-June 2008, *supra* note 3, at 55-78.

⁵ MODEL RULES OF PROF’L CONDUCT (2010).

⁶ CODE OF CONDUCT FOR EUROPEAN LAWYERS [hereinafter CCBE CODE], *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf.

⁷ Laurel S. Terry, *An Introduction to the European Community’s Legal Ethics Code, Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 9 (1993-94).

⁸ Katerina Lewinbuk, *Russia’s Labor Pains: The Slow Creation of a Culture of Enforcement*, 32 FORDHAM INT’L L.J. 846, 848 (2009).

an old Russian saying, “[t]he law is like the shaft of a wagon, it goes wherever you turn it [and]...remains fully embedded in the public consciousness.”⁹ Accordingly, the existing enforcement mechanisms for any Russian law are sometimes unworkable, and the laws of attorney ethics similarly present predictable challenges in terms of enforcement. In fact, the Fourth All-Russian Congress of Attorneys that took place in 2009 openly stated that “year after year, contrary to the law, attorneys are asked to testify as witnesses in criminal cases against their clients; attorneys’ offices are searched; attorneys are not permitted to meet detained clients; and attorneys are not provided with the documents necessary for the provision of legal assistance.”¹⁰

To conclude, this article attempts to predict upcoming steps in the development of the ethical framework for the legal profession in Russia and offers anticipated benefits and downsides to these new developments.

II. HISTORICAL OVERVIEW OF THE LEGAL PROFESSION IN RUSSIA

In Russia, the legal profession and its regulation have gone through many changes. Specifically, there are three main periods in the development of the Russian legal profession: the

A philosophical question of why people choose to follow the law does not have a simple answer. One way to look at this dilemma is not to assume that human behavior responds primarily to punishment and reward, but rather to recognize that human behavior is likely affected by the “legitimacy of legal authorities and the morality of the law.”

Id. at 886 (quoting THOMAS R. TYLER, *WHY PEOPLE OBEY THE LAW* 168 (2002)).

An argument can be made that the cultural lack of faith in the law is currently undergoing a transformation in Russia although this transition will still take time to develop. The society’s appreciation of the rule of law will continue to develop along with all its economic changes and it will eventually become a part of the Russian society, although it may still differ from what is most familiar to a Westerner. In reality, such changes often begin with the government’s endorsement of the idea and it appears to be now happening in the Russian Federation.

Id. However, it is important to note that these feelings of distrust toward the Russian legal profession exist and will need to be eliminated in other countries as well. See Glenn P. Hendrix, *Business Litigation and Arbitration in Russia*, 31 INT’L LAW. 1075 (1997) (discussing a particular instance in which an American company was afraid its representatives would be killed if they litigated a case in Russia).

⁹ VASILY VLASIHIN, THE BROOKINGS INSTITUTION, *LAW & DEMOCRACY IN NEW RUSSIA* 46 (Bruce Smith & Gennady Danilenko eds., 1993).

¹⁰ Alexei Trochev, *Guest Editor’s Introduction – Russia’s Attorneys Under Pressure: Courts to the Rescue?*, STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, Nov.-Dec. 2008, at 5 (citation omitted).

first stage from the Tsarist years of 1864 through the Communist Revolution in 1917;¹¹ the second period from the Communist Revolution of 1917 through the collapse of the Soviet Union in 1991;¹² and the third, and current stage, spanning from the 1991 collapse of the Soviet Union through the present transitional free market economy and its in-progress democracy.¹³ Throughout these three periods, Russia has remained a country governed by civil law.¹⁴

A. Prior to 1917

Prior to 1861, Russian society, along with its values and perspectives, was formed by the system of serfdom and its attached dependency on the master and lack of personal freedoms, which became a substantial obstacle in the country's economic development. Having existed under the dominance of a serfdom regime for a number of centuries,¹⁵ the Russian population became oppressed, overall cunning and lacking initiative.¹⁶ In fact, that time in Russia can mainly be characterized as troubled by bureaucracy, corruption, lawlessness and dependency on

¹¹ See NICHOLAS V. RIASANOVSKY & MARK D. STEINBERG, A HISTORY OF RUSSIA 349-50 (7th ed. 2005) (discussing the judicial reforms which took place at the end of 1864).

¹² See *id.* at 451-607 (discussing the rise and fall of the Soviet system).

¹³ See *id.* at 609-65 (detailing the political, social, and cultural changes that have taken place in Russia since the end of Communism).

¹⁴ WILLIAM BURNHAM ET AL., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 3 (3d ed. 2004) (“[S]ystematic reception of Roman and civil law became possible...during the 18th, 19th, and early 20th century....Although it came late and by an indirect route, the civil law tradition in Russia was well established by the time of the Revolution of 1917.”). Moreover, until the recent phase, it has clearly been an inquisitorial system of justice in criminal cases, rather than one that includes a number of adversarial components. Note that, under Putin, one of the “critically important changes in the [Criminal Procedure] Code [was] the adoption of adversarial principles.” Jeffery Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT’L & COMP. L. 511, 545 (2008). “The replacement of the judge-dominated mixed court by the jury was meant to eliminate the judiciary from the task of deciding guilt, replacing them with a group of citizens who were not caught in the web of dependence in which Russian judges found themselves.” Stephen C. Thaman, *The Constitutional Rights to Jury Trial and Adversary Procedure in Russia*, in RUSSIA AND ITS CONSTITUTION 141, 142 (Gordon B. Smith & Robert Sharlet eds., 2008).

¹⁵ See SMITH, *supra* note 2, at 12-13 (discussing the spread of serfdom and its consequences throughout the sixteenth and seventeenth centuries). Serfdom did not become part of the formal law until the early seventeenth century. RICHARD CHARQUES, A SHORT HISTORY OF RUSSIA 45 (2nd ed. 1962). However, “in a great variety of forms regulated by custom the practical condition of serfdom was widespread in the fifteenth century or even earlier.” *Id.* at 46. In the period leading up to reform, serfs represented nearly forty-five percent of the population. RIASANOVSKY & STEINBERG, *supra*, note 11, at 343.

¹⁶ RIASANOVSKY & STEINBERG, *supra*, note 11, at 343 (describing the serfs as “oppressed and exasperated beyond belief”).

the decision maker who had almost absolute control over other individuals.¹⁷ The country's environment did not allow for proper application or affect of any types of rules or laws, and law enforcement mechanisms were virtually nonexistent. Unable to keep up with the rapid growth of the West European economies, which was accelerated by industrial revolution, sea trade and colonialism, Russia was facing the pressure of social and economic changes in order to preserve its status in the world community.¹⁸ Accordingly, a major agrarian reform took place in 1861.¹⁹

Pursuant to that reform, all serfs were freed since, according to Tsar Aleksandr II, "it [was] better to liberate the peasants from above rather than to wait until they freed themselves from below."²⁰ Serfdom's abolition, however, was accomplished on ruthless terms for the peasants and led to intensification of revolutionary movements.²¹ The overall situation in the

¹⁷ The serfs themselves were a large source of the lawlessness that occurred during this time. *See id.* According to a Russian historian, there were 1467 peasant uprisings during the nineteenth century prior to abolition. *Id.* Over time, the uprisings became more violent, and lives were lost after the military became involved to restore order. *Id.* In addition to the uprisings, serfs often tried to escape their masters by simply running away or attempting to join the army to fight in the Crimean War. *Id.* at 344. The military also became involved in situations where the peasants tried to flee, due to the fact that they would sometimes attempt to leave in groups of hundreds or thousands. *Id.*

¹⁸ Moral grounds played an important role in the reforms surrounding serfdom. *Id.* Leading up to the emancipation of the serfs, "virtually no one defended [the] institution." *Id.* Most of the opposition to emancipation was based on fear of the dangers that come with such a major change in society. *Id.* This can be contrasted with the opposition toward abolition of slavery in the United States which was often based on people's strong support of the institution itself. *Id.*

¹⁹ *Id.* at 345 ("Alexander II signed the emancipation manifesto on March 3, 1861...").

²⁰ DAVID M. CROWE, A HISTORY OF THE GYPSIES OF EASTERN EUROPE AND RUSSIA 161 (1995). The government issued sixteen decrees which resulted in freedom for over forty million peasants working on state-owned lands, private estates, and estates belonging to the imperial family. CHARQUES, *supra* note 16, at 156. It is interesting to compare this with the abolition of slavery in the United States. As just discussed, the Soviet emancipation was achieved via legislative grounds. *Id.* However, the freedom of about four million slaves in the United States was only achieved after a devastating Civil War. RIASANOVSKY & STEINBERG, *supra*, note 11, at 346.

²¹ *See* SMITH, *supra* note 2, at 14 (discussing reforming the Russian legal system was mandated by "dramatic changes on the domestic scenes"); *see also* CHARQUES, *supra* note 16, at 155 ("Freedom for the peasantry was won only on terms which substituted a new form of economic servitude...and perpetuated their isolation from the rest of society."). A particular area in which the emancipated peasants suffered inequality was civil rights. CHARQUES, *supra* note 16, at 157. The peasants were still required to pay a poll-tax and were not permitted to leave the area in search of employment due to the "internal passport system." *Id.* Even more ruthless was the fact the peasants could still be administered corporal punishment. *Id.*

A less extreme example of the continuing oppression pertains to land ownership. After abolition, the freed peasants were given the ability to purchase land on credit. *Id.* at 156. However, the land was over-valued, and "holdings were cut down to an average of half of what the peasant had formally cultivated...." *Id.* Furthermore, the peasants did not hold the land as private property – possession was instead vested in the peasant commune. *Id.* at 157.

country required a substantial transformation of the role of the rule of law in society, and the “pressures to reform the tradition-laden, cumbersome, and antiquated legal system in Russia had grown.”²² It called for the triumph of laws over corruption and for making society believe in the power of these laws.²³ Although the Russian tsars issued “countless decrees on the necessity of reforming the administration of justice”²⁴ in the past, those attempts were insufficient to accomplish any visible results. They were based on the tsars' perception of a legal system that followed an established German model, which viewed laws “as means to induce officials to implement the legislative enactments of the supreme power.”²⁵ However, finally in 1864, Tsar Aleksandr II took steps to establish a number of legal reforms to strengthen and professionalize the legal profession²⁶ with the goal of engendering a “new respect for law in the population.”²⁷

These reforms included the creation of an overseeing body for Russia’s lawyers (the “advokatura” or “advocacy”) and setting professional criteria for judges and lawyers – such as the requirement of a degree.²⁸ Uniform legal standards began to be established across Russia, and the ethics and philosophy behind the standards were given serious thought and implemented into professional regulation.²⁹ “Progressive and highly educated lawyers replaced ignorant and

²² CHARQUES, *supra* note 16, at 12.

²³ Because the legal system specifically “reflected the gross inequities of Russian society,” a substantial legal reform was needed. *Id.*

²⁴ Richard Wortman, *Russian Monarchy and the Rule of Law: New Considerations of the Court Reform of 1864*, 6 KRITIKA: EXPLORATION IN RUSS. & EUR. HIST. 145, 145 (2005), available at <http://muse.jhu.edu/journals/kritika/v006/6.1wortman.html>.

²⁵ *Id.*

²⁶ *Id.* (“The court reform of 1864 stands out as an exceptional event, a moment when the government accepted a judicial system that embodied the very principles that the rulers and officials of the Russian state had long repudiated as alien and pernicious.”); see also PAMELA JORDAN, DEFENDING RIGHTS IN RUSSIA 20-21 (2005). Prior to 1864, lawyers frequently had no professional education and were often “disreputable, and were not supervised by any professional organizations.” JORDAN, *supra*, at 20. These reformations also helped to improve perception of the profession by introducing public trials in the country for the first time. Peter H. Solomon, Jr., *Threats of Judicial Counterreform in Putin’s Russia*, 13 DEMOKRATIZATSIYA 325 (2005), available at 2005 WLNR 1668317.

²⁷ SMITH, *supra* note 2, at 18.

²⁸ Peter Roudik, *Vladimir Spasovich and the Development of the Legal Profession in Russia*, 32 INT’L J. LEGAL INFO. 593, 594 (2004).

²⁹ *Id.*

careless so-called ‘legal midwives.’ The main characteristic of this new generation of lawyers was their desire to establish a professional organization and a strong adherence to the law.”³⁰ Even though a lawyer’s primary obligation was to the Tsar and his established overseeing body, the lawyer’s goal was to help the client insofar as these two obligations did not conflict.³¹ At that time, legal education of Russian lawyers offered “vast legal knowledge, scientific approach, and oratorical skills,”³² and lawyers often used foreign sources in their legal research and exchanged ideas with foreign lawyers.³³ In fact, emerging Russian laws were frequently compared to French, Austrian, and German codes.³⁴

It is important to note, however, that because Russia was an absolute monarchy, its legal environment was fully influenced by the personality and political approach of each individual tsar.³⁵ A number of obstacles stood in the way of successful progress and development of the legal environment in Russia, such as, the movement of nihilism, which denied the existence of law and became especially popular in the 1860s.³⁶

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 596.

³³ *Id.* at 600.

³⁴ *Id.*

³⁵ For example, Alexander III ruled as tsar from 1881-94 and rejected many reforms which his predecessor initiated. RIASANOVSKY & STEINBERG, *supra* note 11, at 362. Many of his ideas came from Constantine Pobedonostsev, who served first as Alexander III’s tutor and later his supporter and a key reactionary. *Id.* at 363. Pobedonostsev stressed the “danger of human reason,” and thus Alexander III’s main concern became the preservation of autocracy. *Id.* His “counterreforms” were also aimed at maintaining the class system, and he tightened control over Russian peasants. *Id.* at 364-65. During Alexander III’s reign, non-Orthodox denominations experienced discrimination and many restrictions on religious practice. *Id.* at 365. Nicholas II (Alexander III’s son) took over as tsar in 1894. *Id.* at 367. He strongly believed the autocratic power of the tsar was the only way Russia could survive and progress. *Id.* Although there were expectations Nicholas II would relax his father’s restrictive policies and institute reforms, he vowed to “preserve the principles of autocracy as firmly and unswervingly as did [his] late father.” *Id.* at 369. However, due to building societal pressures, Nicholas II was forced to relinquish some of this concentrated power. *Id.* His 1905 October Manifesto created the Duma and gave it the power to reject or confirm all proposed laws. *Id.* at 381. It also guaranteed civil liberties to Russian citizens. *Id.* However, Nicholas II regretted relinquishing his power and attempted to regain it in later years. *Id.* at 383.

³⁶ Nihilism is explored in IVAN TURGENEV’S, *FATHERS AND SONS* (Signet Classics 1961) (1862). The word comes from the Latin *nihil*, meaning “nothing.” *Id.* at 24. The text describes a nihilist as “a man who admits no established authorities, who takes no principles for granted, however much they may be respected.” *Id.* at 25. The movement represented a “fundamental rebellion against accepted values and standards: against abstract thought and

B. The Soviet Times

In 1917, all these developments were quickly abrogated, however, with the tremendous changes that took place following the Great October Socialist Revolution of 1917. The Revolution totally dismantled the concept of the rule of law³⁷ as the “Marxist-Leninist ideology dictated an extreme and unvarying instrumentalism towards all legal institution.”³⁸ In fact, Vladimir I. Lenin, the leader of the Bolsheviks, was quick to issue a decree to abolish and suspend all tsarist courts when he came to power.³⁹ The First Constitution of the Soviet State,⁴⁰ which came into effect during this time, contained a number of misleading provisions that appeared to protect the interests of the people. These same provisions, however, offered plenty of room for various interpretations, which always resulted in favoring the interests of the party

family control, against lyric poetry and school discipline, against religion and rhetoric.” RIASANOVSKY & STEINBERG, *supra* note 11, at 354. Furthermore, nihilists’ actions were “governed by utility.” TURGENEV, *supra*, at 57. “Fathers” referred to the generation of the 1840’s, while “sons” referred to 1860’s generation. RIASANOVSKY & STEINBERG, *supra* note 11, at 353-54. The fathers believed in ideas of romanticism “with its emphasis on the metaphysical, religious, aesthetic, and historical approaches to reality” which clashed with the sons’ nihilistic beliefs. *Id.* at 354.

After Turgenev’s novel, nihilism became an important theme throughout Russian literature. See, e.g., FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (Penguin Group 1997) (1866). Dostoyevsky’s CRIME AND PUNISHMENT depicts an extreme nihilist (Raskolnikoff) whose denial of nearly everything, including human emotion, leads him to murder for money. See *id.* The novel shows the powerful negative effects the nihilist movement was capable of producing. See *id.* However, Raskolnikoff is ultimately consumed with “sincere sorrow” about the murder. *Id.* at 416. These feelings cause Raskolnikoff to turn himself in and confess to his role in the murders. *Id.* at 421. His remorse and the love he develops for a young woman, which also encourages his confession, seem to suggest triumph over nihilism.

³⁷ See Jeffrey Kahn, *The Search for Rule of Law in Russia*, 37 GEO. J. INT’L L. 353, 380 (2006).

³⁸ *Id.*

³⁹ *Id.* (citing SAMUEL KUCHEROV, THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION 22-24 (1970)). The decree was issued on December 5, 1917. *Id.* Marxism taught that law and jurists would no longer be necessary under a dictatorship. William D. Meyer, *Facing the Post-Communist Reality: Lawyers in Private Practice in Central and Eastern Europe and the Republics of the Former Soviet Union*, 26 LAW & POL’Y INT’L BUS. 1019, 1022 (1995) (citation omitted).

⁴⁰ The Soviet Union adopted 3 different versions of the Constitution. The Russian Soviet Federated Socialist Republic initially adopted its constitution, which “established the fulfillment of socialism as the immediate goal,” in 1918. SMITH, *supra* note 2, at 80. However, the formal establishment of the Soviet Union in 1922 created the need for a new constitution. *Id.* The first constitution of the Soviet Union was ratified in 1924, and its focus was to specify the powers of federal bodies and constituent republics. *Id.* The second constitution of the Soviet Union was adopted under Stalin in 1936 and clearly set forth the state’s powers and the Soviet citizens’ duties and called for new criminal and civil codes that “reestablished the individual as a ‘juridical person’ with the capacity to enter into legal relationships.” *Id.* at 34. The 1977 Constitution (“Brezhnev Constitution”) was not dramatically different from previous constitutions. *Id.* at 81. In fact, some observers believed the new constitution was promulgated to promote Brezhnev’s image as “the Law Giver” rather than to fix inadequacies of the previous constitution. *Id.*

and State. To that end, Andrei Ya. Vyshinsky, Stalin's procurator-general, specifically stated a few years later: "The formal law is subordinate to the law of the Revolution. There might be collisions and discrepancies between the formal commands of laws and those of the proletariat revolution... This collision must be solved only by the subordination of the formal commands of law to those of party policy."⁴¹

For example, the law contained a vague and catch-all provision subjecting individuals to punishment for behavior that did not uphold the high status of a Soviet citizen.⁴² Violation of this provision was considered a crime punishable by jail time and other types of sentencing.⁴³ It was frequently cited during the punishment of those who opposed various aspects of the Soviet regime, and many dissidents were forced into exile, psychiatric hospitalizations and subjected to other penalties under this provision.⁴⁴ The main job or task for attorneys at that time became

⁴¹ SMITH, *supra* note 2, at 27 (quoting ANDREI YA. VYSHINSKY, *SUDOUSTROISTVO V SSSR* 32 (Yuridicheskaya literatura 2d ed. 1935) (1935)).

⁴² Many laws during this time were intentionally vague so that state prosecutors had great flexibility in convicting people they considered enemies. SMITH, *supra* note 2, at 35. The doctrine of analogy also emerged at this time which allowed punishment for an act that was not itself expressly prohibited but was analogous to an act which the criminal code did expressly prohibit. *Id.* For example, Article 58 of the code allowed punishment for "anti-Soviet agitation" and "sabotage" among other things. *Id.*

⁴³ See SMITH, *supra* note 2, at 35 (discussing that the power to administer punishment was given to special boards within the Ministry of Internal Affairs which did not have to follow normal judicial procedure and had the authority to exile or imprison anyone they considered to be "socially dangerous" for up to five years). An example of how widespread punishment was can be seen by examining the city of Moscow. Between 1936 and 1938, the Supreme Court tried and convicted thirty thousand defendants, all of which were punished with death by firing squad. Jonathan D. Greenberg, *The Kremlin's Eye: The 21st Century Prokuratura in the Russian Authoritarian Tradition*, 45 STAN. J. INT'L L. 1, 7 (2009).

⁴⁴ Greenberg, *supra* note 44, at 9 (citation omitted). For example, the famous exile of academician Andrei Sakharov to Gorky took place at that time. Sakharov was a nuclear physicist known for making the Soviets' first hydrogen bomb. 1980 Soviet Dissident Sakharov Banished, http://news.bbc.co.uk/onthisday/hi/dates/stories/january22/newsid_2506000/2506763.stm (last visited June 25, 2010). Despite Sakharov's contributions, he was a well-known dissident for more than thirteen years. *Id.* He later campaigned for disarmament and then won the Nobel Peace Prize in 1975 for his work focusing on respect for human rights. *Id.* The events leading up to his seizure included an interview on American television during which he stated Soviet troops should be removed from Afghanistan, voiced his support for boycotting the Olympics in Moscow, and stated he agreed with sanctions ordered by U.S. President Carter. *Id.* The Soviet state did not tolerate Sakharov's outspoken disagreement – he and his wife, Yelena Bonner, were exiled to Gorky (250 miles away from Moscow), a city foreign reporters were not allowed to enter. *Id.* During the almost seven years he was in exile, Sakharov continued his work for human rights, including staging three hunger strikes. *Id.* Bonner was charged with "slander against the Soviet state" when she tried to fly to the U.S. in 1983, and there is speculation the charges were brought merely to force her back into exile. *Id.* Sakharov and other dissidents were released in the late 1980's when

merely to argue and provide support for the legality of the described provisions and the actions of the State.

Many attorneys were morally and professionally corrupt at that time in history as they received different government privileges and went out of their way to assist the State with punishing individuals for anti-state views, religious affiliations, etc.⁴⁵ Under the leadership of the Soviet State, it was typical to practice what Russians called the “telephone law,” meaning judges would receive a phone call from a top party member or bureaucrat telling him what he needed to do in his case, and the judge had to abide by such instructions.⁴⁶ Obviously, there was no point in discussing any ethical aspects of the legal profession in general because judges, and consequently lawyers simply represented a weapon in the hands of the party and State and had to remain obedient in order to preserve their lives, jobs and status.

Gorbachev relaxed censorship and gave people more freedom to offer criticism and insight on how problems could be resolved. RIASANOVSKY & STEINBERG, *supra* note 11, at 589.

The treatment of academics such as Sakharov and Bonner is explored in ALEKSANDR SOLZHENITSYN, *IN THE FIRST CIRCLE* (Harry T. Willetts trans., Harper Perennial 2009) (1968). Solzhenitsyn himself spent eight years in a prison research institute (call the Gulag) prior to writing the novel. Edward E. Ericson, Jr., *Foreword to id.*, at xiii. The first version released of this novel was shortened from ninety-six chapters down to eighty-seven so that it would pass censorship requirements. *Id.* at xiv. The title references Dante’s *Inferno* in which philosophers and other various pagans were kept in the first circle of Hell versus the lower circles where torment intensified. *Id.* at xvii. The prisoners’ sole purpose is to work on projects for the state, and they are given “luxuries” not afforded to labor camp prisoners to keep up their morale, such as tobacco and adequate food. *Id.* Despite this, many prisoners still struggle with the moral aspect of aiding the effort with which they strongly disagree. *See* SOLZHENITSYN, *supra*. Some even cease to cooperate with the system although they are subjected to harsher treatment as a result. *See id.* The feeling of internal conflict is set in the opening chapter as a Ministry of Foreign Affairs officials ponders the question “[i]f we live in a state of constant fear, can we remain human?” *Id.* at 3.

⁴⁵See e.g., SMITH, *supra* note 2, at 45 (discussing that advocates and other officials in the legal system were required to make periodic reports on the cases in which they were involved and that failure to fill quotas was not looked upon favorably by authorities). *But see* G.M. Shafor, *General Characteristics of the Modern Russian Bar*, http://abc.vvsu.ru/Books/pravov_regulir_advoc_dejat/page0002.asp (offering stories of Soviet lawyers that “showed considerable civil courage”).

⁴⁶See John Reitz, Symposium: *Export of the Rule of Law*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 429 . n. 19 (2003) (citation omitted) (“It has been widely documented that Communist Party officials have instructed **judges** in communist countries how to rule in politically sensitive cases, often by telephone.”); *see generally* Kathryn Hendley, ‘Telephone Law’ and the ‘Rule of law’: *The Russian Case*, 1 HAGUE J. ON RULE L. 241, 241 (2009) (explaining that the recent Yukos case shows that the concept of “telephone law” is alive and powerful in Russia today). For additional discussion of the Yukos case, see Kahn, *supra* note 38, at 404-07.

The whole concept of lawyering was barely in existence at that time because attorneys often had to prioritize the best interests of the party and State to the interests of their clients.⁴⁷ More specifically, party orders were the law.⁴⁸ In fact, the establishment of the Soviet State brought with it a very different role and image of lawyers when it prohibited private law firms altogether.⁴⁹ It was the “Ministry of Justice, not the bar or individual members,” that oversaw the legal profession, including the establishment of the “fee structure for legal services.”⁵⁰ Thus, the lawyer was ethically obligated to do what was advantageous to the state, rather than focusing on his client or the legal profession. For example, if the lawyer knew that his client was trying to overthrow the State, then he had to relay that information to the judge. Because private enterprise no longer existed, many lawyers became paper-pushers or plain bureaucrats at best, ensuring that the bureaucracy of the system worked. Attorneys practiced in “judicial consultations” or as they are also referred to as “legal consultation bureaux,” which were typically located in the same buildings as courts.⁵¹ Enterprises neither sued each other, nor were they sued by individuals. Furthermore, the procuracy⁵² served as the primary legal branch –

⁴⁷ “The position of the Soviet lawyer is complicated. We have seen that he is often considered as an aid to the court and not merely as a representative of the interests of his client.” Samuel Kuchеров, *The Legal Profession in Pre- and Post-Revolutionary Russia*, 5 AM. J. COMP. L. 443, 466 (1956). During Stalin’s time, for example, the “power of the state was used to stamp out all opposition to Stalin and his regime. This included the widespread use of legally sanctioned terror against Soviet citizens.” SMITH, *supra* note 2, at 34. As such, lawyers had to be on board with the state if they wanted to keep their jobs.

In fact, this alliance with the state was taught from the very beginning of Soviet lawyers’ journey into the legal profession. Meyer, *supra* note 40, at 1031 (“The Communists did not design legal education to train lawyers to solve problems or represent clients; rather, they sought to train politically reliable professionals to operate the state-run system.”). Law graduates typically had state-assigned employment for up to three years after completing school and then shifted to a position in the planned economy. WILLIAM E. BUTLER, *RUSSIAN LAW* 140 (1999).

⁴⁸ Kahn, *supra* note 38, at 386 n.113 (citation omitted).

⁴⁹ Kathryn Hendley, *Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises*, 26 LAW & SOC. INQUIRY 685, 689 (2001).

⁵⁰ ROBERT RAND, *COMRADE LAWYER: INSIDE SOVIET JUSTICE IN AN ERA OF REFORM* 12 (1991).

⁵¹ DMITRY SHABELNIKOV, PUB. INTEREST LAW INST., *THE LEGAL PROFESSION IN THE RUSSIAN FEDERATION* 3 (2008).

⁵² Peter the Great established the procuracy in 1722. Mary Chaffin, *Inside the Russian “Bar”: An Oregon Lawyer Takes a Look at the Russian Legal Profession*, 56 OR. ST. B. BULL. 23, 24 n.4 (1996). The procuracy served as the “supreme supervisory power” over the Russian legal and administrative system and guaranteed compliance with

prosecuting criminals and any other types of offenders. People were not generally entitled to legal protection, and there were very few legal safeguards in place. Primarily, lawyers would often go to the procuracy or find other ways to assist the State, go to the academia to write about other countries' laws and constitutions, or go to the industry to be bureaucrats.⁵³ This period in Russian history substantially lacked lawyering – a concept which was already a permanent part of culture and society in the United States and Western Europe.

III. THE LEGAL PROFESSION IN RUSSIA TODAY

During “perestroika,” one of the major goals was to seriously change the core of existing mentality and to transition from totalitarianism to a “law abiding state,”⁵⁴ which was necessary in order to successfully evolve from a dictatorship to a democracy. To accomplish this tremendously ambitious goal, it was crucial not only to revise old laws and enact new ones but also to create mechanisms that would ensure enforcement of the new laws by their proponents, including members of the legal profession such as lawyers, judges and prosecutors. To do so, it became critical to rebuild trust in the legal profession. Professional ethics build a foundation for client and societal trust in the legal profession by providing regulation and guidance for the legal field. Thus, the work to develop a strong lasting foundation and ethical framework for the legal profession started at that time and is still in progress today.

legal norms. *Id.* Additionally, it was in charge of criminal prosecution and oversaw criminal investigations. *Id.* For a detailed history of the procuracy and a discussion of its function over time, see Greenberg, *supra* note 44.

⁵³ The number of full-time advocates fell from 13,000 in 1917 to 650 in 1921. Meyer, *supra* note 40, at 1023 (citing EUGENE HUSKEY, *RUSSIAN LAWYERS AND THE SOVIET STATE* 12 (1986)).

⁵⁴ See RIASANOVSKY & STEINBERG, *supra* note 11, at 584-91 (discussing the reforms that took place under Gorbachev). “Gorbachev...acknowledged the widespread withdrawal from public life, the spread of alcoholism and drug addiction, the growth of crime...and cynicism.” *Id.* at 586. He pronounced the Soviet Union was in need of a “structural and spiritual reconstruction (perestroika).” *Id.*

It is important to note that Russian society is generally known to be rather closed to change and slow in action.⁵⁵ Ongoing discussions of ambitious goals coupled with reluctance to take action and fear of consequences can be traced back to Russia's early history, including the centuries of serfdom and suppression of personal rights and liberties during communism, which are just single links in the chain of Russia's long and complicated past. As one reformer stated: "The worst legacy we have from the Stalin era is the way we think. And we cannot obtain new thinking on credit."⁵⁶ As such, Russia's attempts to reform and regulate the legal profession have long represented a difficult path and will take years to fully implement.

During the transitional years of 1989-1991, when Russia undertook the effort of mass privatization of state property, western scholars, as well as Russian reformers, believed that a "powerful constituency for the rule of law" would result.⁵⁷ The result, instead, was that "corruption, a weak state, and ineffective laws made private ownership close to irrelevant."⁵⁸ In fact, one scholar argues:

Ten years later, Russia is, arguably, worse off than it was under the Soviets. Instead of a democratic, free-market society governed by a rule of law, Russia is astonishingly corrupt, a society which an observer has aptly described as 'robber capitalism.' The grossly uneven economic effects of 'robber

⁵⁵ That tendency of Russian people to slowly process changes had been illustrated in Russian classical literature. For an example of this, see ANTON CHEKHOV, *The Cherry Orchard*, in CHEKHOV FOR THE STAGE 187 (Milton Ehre trans. 1992). The main character in Chekhov's play fails to accept that she is in danger of losing her estate due to her financial demise. *Id.* She constantly brings up memories of her young son who drowned several years earlier and reminisces about a previous relationship with a man in Paris. *Id.* She clings to the way her life used to be and fails to rectify her present problems. *Id.* Her desire to hold on to the past ultimately causes her to lose her home and uproot her family. *Id.*

⁵⁶ SMITH, *supra* note 2, at 191 (quoting MALACHI MARTIN, *THE KEYS OF THIS BLOOD* (1990)).

⁵⁷ KARLA HOFF & JOSEPH E. STIGLITZ, *AFTER THE BIG BANG? OBSTACLES TO THE EMERGENCE OF THE RULE OF LAW IN POST-COMMUNIST SOCIETIES* 1-2 (2002).

⁵⁸ *Id.* at 3 (citing CHRYSTIA FREELAND, *SALE OF THE CENTURY: RUSSIA'S RIDE FROM COMMUNISM TO CAPITALISM* 344 (2000)).

[T]he Russian reformers essentially did three things. First, they drafted a great volume of laws, and, surprisingly, many of them have been promulgated. Second, they instituted a great number of new legal and judicial institutions and tried to reform the existing ones. Third, they carried out an abrupt privatization. In spite of all this, while Russia does have a legal system, it is widely seen as ineffective. Anders Aslund, *Law in Russia*, 8 E. EURO. CONSTITUTIONAL REV. 96, 97 (1999), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=413>.

capitalism' are evident. A few individuals have amassed obscene wealth, generally through illegal or sweetheart deals with the government.⁵⁹

Despite that position, during the period of 1987-1997, the number of all cases filed in court (including criminal, civil and administrative proceedings) more than doubled, which provides a "hopeful sign of a growth of public confidence in the courts."⁶⁰

In the 1980s and 1990s, the demand for legal services rapidly increased, and the profession was liberated from the strong influence and control of the Ministry of Justice.⁶¹ During that time, the legal profession in Russia was described as being in "turmoil," and numerous "alternative" institutions that failed to comply with any established educational or professional standards struggled to become established.⁶² These challenges were resolved with the adoption of a new law titled "On Legal Practice and the Bar" in 2002.⁶³ That law established a uniform standard for joining the Bar, as well as an advocate's role and responsibilities.⁶⁴ It also established that each region in the Russian Federation should have a single bar body called Bar Chambers.⁶⁵ In order to obtain the status of advocate, one must belong to a Bar Chamber.⁶⁶ The members of each Bar Chamber are responsible for governing the organization and electing a Council to manage the Chamber.⁶⁷

In the last ten years, Russia has been working especially hard on reshaping its legal profession into a self-regulated system and arguably allowing its attorneys to achieve

⁵⁹ John M. Burman, *The Role of Clinical Legal Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89, 99 (2002).

⁶⁰ PETER H. SOLOMON, JR. & TODD S. FOGLESONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM 114 (2000).

⁶¹ SHABELNIKOV, *supra* note 52, at 3.

⁶² *Id.*

⁶³ *Id.* at 4.

⁶⁴ *Id.*

⁶⁵ *Id.* at 5.

⁶⁶ *Id.*

⁶⁷ *Id.*

independence of judgment.⁶⁸ To that end, relevant corporate bodies, such as Chambers of Attorneys, have been set up now on both a regional and federal level. There are eighty-seven regional Bar Chambers plus the Federal Bar Chamber, which has its headquarters in Moscow.⁶⁹ The Federal Bar represents an association of all regional Chambers, which are required to be members.⁷⁰

The rules for the operations of these bodies were laid down in Spring 2002 in a federal law – "On Work as an Attorney and the Legal Profession in the Russian Federation"⁷¹ (hereinafter "On Work"). In January 2003, the first all-Russian Congress of Attorneys adopted a Code of Professional Ethics for the Attorney ("Code").⁷² Subsequently, in 2004, an amendment

⁶⁸ But see JORDAN, *supra* note 27 (providing a thorough analysis of the history and stages of development of the legal profession in Russia and arguing that the advocacy remains overall weak and plays a limited role in the life of Russian society). However, since 2007, an attorney's (or advocate's considering the law only applies to members of the "advokatura") independence had been guaranteed in writing. The new law, articulated in the "On Work as an Attorney and the Legal Profession in the Russian Federation" contains an article titled "Guarantees of the Independence of the Attorney," specifically offers a number of "[g]uarantees of the [i]ndependence of the [a]ttorney." See On Work, *supra* note 3, art. 17. Among other assurances, it provides that "[i]nterfering in work of an attorney...shall be prohibited" and an "attorney shall not be held liable in any way...for an opinion that he has expressed in the course of work as an attorney." *Id.*

⁶⁹ SHABELNIKOV, *supra* note 52, at 6.

⁷⁰ *Id.*

⁷¹ See On Work, *supra* note 3. An examination of violations of this federal law a year after it was adopted shows "it is no rarity for attorneys to violate the norms of professional ethics." A.S. Taran, *O narushenii advokatami norm professional'noi etiki (po materialam distsiplinarnoi praktiki palaty advokatov Samarskoi oblasti)* [On Attorneys' Violation of the Norms of Professional Ethics (Based on Records of the Disciplinary Practice of the Chamber of Attorneys of Samara Oblast)], 2 IURDICHESKII ANALITICHESKII ZHURNAL 89 (2006), translated in STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, July-Aug. 2008, at 34, 35 [hereinafter STATUTES & DECISIONS July-Aug. 2008]. As an example, thirty-eight attorneys just under the local Samara Oblast Chamber were determined to have violated the above-stated ethical standards in 2003. *Id.* As discipline for their violations, six advocates were given a warning, nine a severe reprimand, and sixteen were given a reprimand. *Id.* Seven advocates received the most severe form of discipline – "termination of the status of attorney." *Id.* Most commonly, violations involved advocates' "inadequate performance of their duties to clients." *Id.* In 2006, 273 attorneys in total were issued disciplinary penalties, and sixty-five had their "status of attorney terminated," i.e. disbarred. Iu.Ia Shutilkin, *Chest' i dostoinstvo, prisushchie professii: obobshchenie distsiplinarnoi praktiki za vtoroe polugodie 2007 goda* [The Honor and Dignity Intrinsic to the Profession: A Summary of Disciplinary Practice in the Second Half of 2007], 1 VESTNIK ADVOKATSKOI PALATY SANKT-PETERBURGA 55 (2008), translated in STATUTES & DECISIONS July-Aug. 2008, *supra*, at 15. Complaints are submitted to the qualification commission whose consultants conduct a preliminary check during which the accused advocate is given the opportunity to provide an explanation/response to the allegation. *Id.* at 13. Interestingly, over sixty percent of cases do not make it past this preliminary check because consultants find no grounds for discipline. *Id.*

⁷² See KPEA.

to the aforementioned law made observance of the Code obligatory.⁷³ A number of additional amendments were approved in 2007.⁷⁴ Since then, the law and the Code together constitute the basis for the ethical practice of law in Russia. The Code was translated and made available in English.⁷⁵ Overall, both “On Work” and the Code (together “Attorney Regulations”) address many topics that are typically covered by attorney ethics rules in the West, such as confidentiality, conflict of interest, attorney-client relations and appropriate fees. However, the attorney regulations also contain a number of provisions that are specific to Russia and inconsistent with what a western lawyer would expect to have imposed on him. For example, the Code views lawyering as “not an entrepreneurial activity”⁷⁶ and restricts advocates from any business-related employment other than “academic, teaching or other creative activities.”⁷⁷

Although these attorney regulations should be viewed as a significant step toward the supervision and uniformity of the legal profession in Russia, the biggest challenge lies in the fact that they only regulate certain members of the profession. Today, Russian attorneys can be divided into two major groups: advocates – members of the organized bar / “advokatura” – and other jurists – unregulated lawyers who are not members of any organized Bar.⁷⁸ As of January 2008, the total number of advocates practicing in Russia amounted to 61,422⁷⁹ with the total

⁷³ *Id.* art. 1.

⁷⁴ *Id.*

⁷⁵ See STATUTES & DECISIONS May-June 2008, *supra* note 3, at 55.

⁷⁶ KPEA art. 1(2). It is interesting to note how many ethical regulations of advocates and proper lawyering are deeply rooted in the Russian legal culture. In particular, commercial activities have been long considered inappropriate for lawyers to engage in. As an example, as early as 1873, the St. Petersburg Council of Sworn Attorneys specifically “prohibited attorneys from receiving commission from business transactions and they were [also] forbidden from participation in any kind of commercial activities.” Roudik, *supra* note 29, at 599.

⁷⁷ KPEA art. 2(1).

⁷⁸ SHABELNIKOV, *supra* note 52, at 4. “Jurist” is a term that can be used for any person who has a legal education and works in a legal specialty. BUTLER, *supra* note 48, at 109.

⁷⁹ BUTLER, *supra* note 48, at 109. The numbers differ substantially depending on the location. *Id.* For example, the number of advocates in the city of Moscow amounted to 7500, while the Nentsky Autonomous District, that has a population of 35,000 people, has only twelve advocates. *Id.*

population of Russia being approximately 143 million people.⁸⁰ It is hard to obtain an accurate number for jurists, but the available statistics say that there are 430,000 of them in the whole country of Russia, which results in the ratio of one advocate per 2,300 people and one jurist per 330 people.⁸¹ Interestingly, a potential benefit of being an advocate is that only advocates are allowed to represent clients in criminal cases, while jurists' practice is limited to civil matters and administrative proceedings.⁸² In addition, the procuracy,⁸³ notaries⁸⁴ and judges⁸⁵ are also a part of the legal system in Russia and can be described as "several distinct professions."⁸⁶

However, because the ethical regulations described above only apply to advocates or members of the "advokatura," there are other legal professionals who remain substantially unregulated and lack detailed ethical guidelines for their practice.⁸⁷

⁸⁰ *Id.* at 5.

⁸¹ *Id.*

⁸² SHABELNIKOV, *supra* note 52, at 4. "Moreover, the only method used for legal aid in criminal cases is *ex officio* appointment." *Id.* at 13.

⁸³ BURNHAM ET AL., *supra* note 14, at 131. The 1995 law entitled "On the Procuracy of the Russian Federation" defines the procuracy's powers and organization, stating that the procuracy is a "unified and centralized system of federal bodies charged with supervision over the observance of laws on the entire territory of the country." *Id.* at 137-38. The procuracy is designated three major functions. *Id.* at 140. First, it should supervise execution of laws by state bodies, organizations and bodies of local self-government. *Id.* Second, the procuracy is responsible for criminal investigation and prosecution of cases, and third, it is also responsible for participation in civil proceedings. *Id.* In addition, procurators also serve a "legal aid" function, including taking complaints from private citizens. *Id.* The Prosecutor General is appointed for a five-year term with that appointment being incredibly politicized because of the enormous powers that accompany the position. *Id.* at 138. The Prosecutor General reports to the Federal Assembly and the President of the Russian Federation, and he appoints all members of lower procuracy. *Id.*

⁸⁴ *Id.* at 131. To become a notary, one must have a legal education similar to what is required of advocates, judges, and procurators and complete an apprenticeship for a minimum of one year. *Id.* at 160. There are two different categories of notaries – state and private – but their activities are essentially the same. *Id.* In civil law countries, notaries commonly perform duties which would be reserved for lawyers in the United States. *Id.* One of their most important duties is "certification of legal transactions that the legislature has determined need stricter formal requirements in order to be valid." *Id.* In addition, they certify wills, give legal advice, and hold some "quasi-judicial power." *Id.* at 161. Notaries' fees can be relatively high, and they are paid well in comparison to other legal professionals. *Id.* at 162.

⁸⁵ *Id.* at 131. For a discussion of the selection process, qualifications, tenure, and other information related to the judicial office, see *id.* at 162-66.

⁸⁶ *Id.* at 131.

⁸⁷ See SHABELNIKOV, *supra* note 52, at 4. There has, however, been some effort to guarantee judges will act in an ethical manner as well. Russia's Code of Judicial Ethics was approved in 2004. See CODE IN RUSSIAN [Code of Judicial Ethics] (Russ.), translated at http://translate.google.com/translate?js=y&prev=_t&hl=en&ie=UTF-8&layout=1&eotf=1&u=http%3A%2F%2Fwww.ssrf.ru%2Fprint_page.php%3Fid%3D13&sl=ru&tl=en. However, the judicial code is comprised of only thirteen articles and is less detailed than the comparable code for advocates. See *id.* (stating guidelines for general conduct, conduct in the implementation of professional activities, off-duty

IV. NEW CODE OF PROFESSIONAL ETHICS FOR ADVOCATES

Overall, the creation of a code of ethics enacted to regulate the legal profession is an exciting development in Russia's legal practice. The purpose of the Code is to set forth a uniform set of guidelines for members of the "advokatura" to follow.⁸⁸ According to Article 4.1. of the "On Work," these newly enacted attorney regulations are based on the Constitution of the Russian Federation and were approved by the Duma in 2002.⁸⁹ Similar to their western counterpart, the "On Work" and the Code, which is a bit more detailed than the "On Work," provide guidelines for a wide range of topics impacting the attorney and his work, including schooling and requirements for admission to the profession/ "advokatura," qualifications for joining the Chambers of Attorneys, regulations and discipline, the attorney-client relationship, types of permitted law practice by advocates, conflicts of interest, legal aid and issues of client confidentiality.⁹⁰ Below is an overview of major topics covered.

A. Admission to the Profession & Schooling Requirements

The new attorney regulations set forth specific schooling and experience requirements for obtaining the status of advocate⁹¹ throughout the territory of the Russian Federation. Article 9 specifically states that a candidate needs to have obtained a higher legal education from a state-

conduct, disciplinary action against judges, and applicability of the code). Additionally, there are several other laws that regulate the professions of judge and notary. See Burnham et al., *supra* note 14, at 160-66 (discussing that notaries are governed by the "Fundamental Principles of Legislation on the *Notariat*" and that judges' activities are guided by laws such as "On the Status of Judges", "On the Constitutional Court", and "On the Judicial System" which set forth qualifications and requirements for judicial selection and tenure).

⁸⁸ See On Work, *supra* note 3, art. 4(1).

⁸⁹ *Id.*

⁹⁰ See generally KPEA.

⁹¹ PLEASE INSERT SPECIFIC ARTICLE CITE RE THIS. Although the English translation of the "On Work" uses the term "attorney," this article will use "advocate" instead as it will further emphasize that these requirements are applicable to members or prospective members of the "advokatura"/advocacy only.

accredited institution or academic degree in the area of law.⁹² In addition, a two-year period of legal experience or internship in a legal practice is required.⁹³ It is further explained that individuals who are fully or partially incompetent, as well as those who have “prior undischarged or uncleared convictions for committing an intentional crime” are not eligible to apply to become an advocate.⁹⁴

Furthermore, one needs to successfully pass a qualifying examination, which consists of oral and written questions.⁹⁵ A special commission, consisting of thirteen members who serve two-

⁹² On Work, *supra* note 3, art. 9(1) (“A person who has a higher legal education obtained in a state-accredited educational institution of higher professional education or who has an academic degree in a legal specialism shall have the right to acquire the status of attorney in the Russian Federation.”). Russia’s system of legal education is largely based on the “Germano-Roman civil law tradition.” BURNHAM ET AL., *supra* note 14, at 131. There are four different types of law schools that students attend – law faculties, state law academies, specialized institutes, and private law schools. *Id.* at 132. Law faculties, which are departments of law within universities, are the most common. *Id.* The schools’ curriculum is set by the Ministry of Education in collaboration with deans of the top law schools. *Id.* at 131. A student can receive a bachelor’s in law after four years of study, a specialist degree after five years, and a master’s degree after six years. *Id.* at 132. The specialist degree is preferred, and the procurator’s office and the courts will not hire someone with only a bachelor’s. *Id.* at 133. However, it is common for lawyers to complete eight years of study plus write a dissertation to earn a candidate’s degree – which is required if the lawyer intends to work in academia. *Id.* at 132.

⁹³ On Work, *supra* note 3, art. 9(1).

The period of work in a legal specialism necessary for acquisition of the status of attorney shall include work:

- (1) as a judge;
- (2) in state positions requiring a higher legal education in federal bodies of state power, in bodies of state power of subjects of the Russian Federation, or in other state bodies;
- (3) in positions that required a higher legal education in state bodies of the USSR, RSFSR, or Russian Federation that existed in the territory of the Russian Federation prior to the adoption of the current Constitution of the Russian Federation;
- (4) in municipal positions requiring a higher legal education;
- (5) in positions requiring a higher legal education in bodies of the Judicial Department of the Supreme Court of the Russian Federation;
- (6) in positions requiring a higher legal education in the legal services of organizations;
- (7) in positions requiring a higher legal education in scientific research institutions;
- (8) as a lecturer in legal disciplines in institutions of middle professional, higher professional, and graduate professional education;
- (9) as an attorney;
- (10) as an attorney’s assistant;
- (11) as a notary.

Id. art. 9(4).

⁹⁴ *Id.* art. 9(2).

⁹⁵ *Id.* arts. 10, 11. The examination passing rate varies greatly depending on a specific location. For example, there was a sixty percent passing rate in Novosibirsk Oblast from 2004 – 2006. SHABELNIKOV, *supra* note 52, at 10 (citation omitted). However, from 2005 – 2006, there was only a thirty percent passing rate in the Republic of Chuvashia. *Id.* (citation omitted). This may be due to a number of different factors such as lack of objectivity in the bar exam, varying education levels in each region, or the “attitude of a particular qualification board.” *Id.*

year terms, must be created in order to “hold qualifying examinations” for applicants and to respond to complaints against advocates.⁹⁶ In case of failure, the exam may be retaken.⁹⁷ The decisions on filed applications are made within three months and candidates that fulfill the stated criteria and pass the examination cannot be denied admission to the “advokatura” / advocacy.⁹⁸ After passing the examination, each applicant must take an oath.⁹⁹ Successful applicants join the Chamber of Attorneys, a non-state, non-commercial organization created for the purpose of ensuring the rendering of “legal aid.”¹⁰⁰ Advocate members are required to pay monthly dues.¹⁰¹

B. Grounds for Suspension or Discipline

The “On Work” merely lists grounds for suspension and termination of the advocate’s status, while the Code sets forth the specifics of and grounds for discipline. The Code states that a violation of either the Code or the “On Work” “committed intentionally or due to crude

⁹⁶ On Work, *supra* note 3, art. 33. The commissions include two judges, two representatives from the Ministry of Justice and the regional legislature, respectively, as well as seven advocates. BURNHAM ET AL., *supra* note 14, at 144 n.35. Members of the commission who are practicing lawyers may combine their service on the commission with their legal work. On Work, *supra* note 3, art. 33.

⁹⁷ On Work, *supra* note 3, arts. 10, 11.

⁹⁸ *Id.* art. 12.

⁹⁹ *Id.* art. 13(1). The oath states “I solemnly swear honestly and conscientiously to perform the duties of an attorney and to defend the rights, freedoms, and interests of clients, under the guidance of the Constitution of the Russian Federation, the law, and the Code of Professional Ethics for the Attorney.” *Id.*

¹⁰⁰ *Id.* art. 29 (“legal aid” essentially refers to what would mean “legal services” or “legal assistance” using legal English). If a Chamber of Attorneys contains more than 300 members, its supreme overseeing body is the conference of attorneys. *Id.* art. 30(1). The council of a Chamber of Attorneys is the “collegial executive body of the Chambers of Attorneys.” *Id.* art. 31(1). The Council is elected from the members of the Chambers and it then elects from its members a President of the Chambers. *Id.* art. 31(2)-(3)(1). Among its responsibilities, the Council ensures the accessibility of legal aid, maintains the register, and provides guidance for advocates upon request. *Id.* art. 31(3). On a federal level, the council of Federal Chamber of Attorneys is charged with assisting in raising the professional level of advocates and defending their social and professional rights. *Id.* art. 37(3)(5)-(3)(6). The All-Russia Congress of Attorneys is the supreme body of the Federal Chamber of Attorneys. *Id.* art. 36(1). Among other important functions, it will adopt the Federal Chamber’s charter, Code of Ethics for Attorney and necessary amendments or additions to it, as well as its own regulations. *Id.* art. 36(2).

¹⁰¹ *Id.* art. 7(1)(5). Membership dues are different for each subject chamber. BURNHAM ET AL., *supra* note 14, at 143 n.34. Advocates in Moscow, for example, pay about nine U.S. dollars (300 rubles) a month. *Id.*

negligence, shall entail application of the measures of disciplinary liability....”¹⁰² However, violations which “[do] not soil [the attorney’s] honor and dignity...damage the authority of the legal profession, and [have] not caused substantial harm to a client or to a Chamber of Attorneys” will not require disciplinary measures.¹⁰³ In addition to termination, disciplinary measures can also include a reprimand or warning.¹⁰⁴

According to the “On Work,” grounds for suspension and/or termination of an advocate’s status will include, among other things, death, incompetence, conviction of a crime, failure to perform professional duties or election of the attorney to a state power, and inability to perform professional duties for a period of more than six months.¹⁰⁵ The Code then specifically explains that complaints against an advocate will be heard first by a qualifications commission and then a “council of the Chamber of Attorneys of a subject of the Russian Federation.”¹⁰⁶ Disciplinary action cannot be taken if more than one year has passed since the violation took place.¹⁰⁷

C. Malpractice Insurance & Legal Aid

The attorney regulations require that all advocates possess malpractice insurance,¹⁰⁸ and it is interesting to note that this is possibly due to a lack of trust towards the legal profession, which

¹⁰² KPEA art. 18(1) (“Crude” negligence can be also referred to as “gross” using legal English. See Butler (CITE NEW EDITION WHEN AVAILABLE)).

¹⁰³ *Id.* art. 18(2).

¹⁰⁴ *Id.* art. 18(6).

¹⁰⁵ On Work, *supra* note 3, arts. 16-17.

¹⁰⁶ KPEA art. 22. Complaints may be initiated by “another advocate; client or his/her representative; person who applied for civil legal aid and was denied such aid; vice president of the bar chamber; governmental agency supervising the bar (i.e. the Ministry of Justice); [or] a court or a judge in certain cases.” SHABELNIKOV, *supra* note 52, at 9 (citing KPEA art. 20(1)).

¹⁰⁷ KPEA art. 18(5).

¹⁰⁸ On Work, *supra* note 3, art. 19 (“In accordance with federal law, an attorney shall insure for risk to his professional property liability...”); *see also id.* art. 7(1)(6). This provision went into effect in 2007; however, many advocates apparently did not carry professional malpractice insurance prior to this because it was simply hard to obtain. *See BURNHAM ET AL.*, *supra* note 14, at 146-47. Based on this history, it is unlikely the new requirement is being strictly followed. It is important to note, though, that malpractice claims have rarely been instituted in the past. *Id.* at 147. When one was brought, it was handled by the collegia. *Id.* Advocates had to compensate clients

has historically been a part of the attorney's image in the eyes of the Russian population. Also of interest is a provision requiring mandatory free legal aid/pro bono services.¹⁰⁹ Such aid has to be rendered in cases that are filed in court with priority given to disputes involving alimonies or compensation damages due to a loss of the household breadwinner, as well as to cases involving veterans of the Great Patriotic War (as long as they don't involve entrepreneurial activities) and citizens of the Russian Federation who were subjected to political repression.¹¹⁰

The Code further states that an advocate shall be "obliged to participate personally or materially in the rendering of free legal aid in instances envisioned by legislation"¹¹¹ while the head of a legal practice shall be required to "take measures to ensure that attorneys duly perform their professional duties" pertaining to free legal aid/pro bono work.¹¹² The Code also maintains that pro bono work should be of the same quality as all other paid work.¹¹³

directly if malpractice was found, and if this requirement was not met, the advocate's right to practice could be revoked. *Id.*

¹⁰⁹ "An attorney shall have the duty ... to render free legal aid to citizens of the Russian Federation." On Work, *supra* note 3, art. 7(1)(2); see also KPEA art. 15(7)-(8).

¹¹⁰ On Work, *supra* note 3, art. 26(1). However, according to one Russian criminal defense lawyer who has been practicing for twenty years, lawyers often find ways to avoid this duty. Telephone Interview with Sergey Thak, Law Offices of Sergei Thak (June 17, 2010). This provision has failed to truly take effect because many attorneys do not have adequate funds to cover court fees for these clients. *Id.* However, there is potentially another loophole which allows chambers of advocates at the subject level to set up funds that lawyers can pay into if they do not wish to take on such cases. BURNHAM ET AL., *supra* note 14, at 148. The funds are then used to pay advocates who are willing to provide representation. *Id.*

¹¹¹ KPEA art. 15(7). Advocates who are new to practice or live in areas of low economic activity are typically more willing to take on pro bono cases. BURNHAM ET AL., *supra* note 14, at 148. These cases can often help their careers by leading to paid work. *Id.* In order to further encourage pro bono service by all advocates, the Association of Lawyers of Russia (ALR) along with the Public Interest Law Institute (PILI) "drafted a Memorandum on Social Responsibility of the Russian Lawyer" in 2008. SHABELNIKOV, *supra* note 52, at 19. The Memorandum sets standards for the annual number of billable hours for lawyers or organizations that join the ALR to spend on pro bono services. *Id.* The minimum is ninety-six hours for organizations or firms, and individual attorneys must devote at least twenty-four hours. *Id.*

¹¹² KPEA art. 15(8).

¹¹³ *Id.* art. 10(8).

D. Permitted Types of Practices by Advocates

The “On Work” specifically explains what types of law firms or other arrangements are appropriate for an advocate’s legal practice. Advocates, however, may choose a form of permissible legal practice.¹¹⁴ The “On Work” provides specific guidelines on how an advocate can open an office including requirements to notify the Chamber of Attorneys, open proper bank accounts and other details.¹¹⁵ The law further groups legal practices into three major categories: collegiums of advocates, advocates’ bureaus and legal advice offices.¹¹⁶ A collegium of advocates is a legal entity consisting of two or more attorneys¹¹⁷ that is considered to be established the moment it is entered into the state registration system.¹¹⁸ In such an arrangement, members are not responsible for the collegium’s obligations, and the collegium is not responsible for its members’ obligations.¹¹⁹

The “Advocate’s Bureau,” on the other hand, is a partnership that unites two or more advocates for the purpose of rendering legal service.¹²⁰ Advocates are able to start a new bureau after having terminated a current one.¹²¹ Finally, a “Legal Advice” office is a “non-commercial entity created in the form of establishment.”¹²² In terms of the numbers of practicing advocates, the guideline is the following: “If [the Legal Advice Office is] on the territory of a single court

¹¹⁴ On Work, *supra* note 3, art. 20(2).

¹¹⁵ *Id.* art. 21.

¹¹⁶ *Id.* arts. 20, 22-24.

¹¹⁷ *Id.* art. 22(1).

¹¹⁸ *Id.* art. 22(8).

¹¹⁹ *Id.* art. 22(12). “Collegia are mostly just offices where lawyers can meet with their clients, use equipment and share a secretary, rather than ‘law firms.’” SHABELNIKOV, *supra* note 52, at 7. Membership is voluntary, and the organization is considered to be a non-profit. BURNHAM ET AL., *supra* note 14, at 146.

¹²⁰ On Work, *supra* note 3, art. 23(1), (3). Bureaus are the least popular way to organize a law practice.

SHABELNIKOV, *supra* note 52, at 7. As of 2008, there were 542 bureaus employing about 2000 advocates. *Id.*

¹²¹ On Work, *supra* note 3, art. 23(12)

¹²² *Id.* art. 24(2).

district, the total number of attorneys in all legal practices [should be] less than twice the number of federal judges....”¹²³

The law further states that advocates have a right to work with legal assistants,¹²⁴ who are not permitted to perform attorney work¹²⁵ and are obliged to protect “secrets,” i.e. confidential information.¹²⁶ Advocates’ assistants must sign contracts specifying the terms of their employment.¹²⁷

E. Attorney Advertising

Attorney advertising is permitted as long as it does not contain an “evaluative description of the attorney,”¹²⁸ other people’s testimonials about the advocate’s work, criticism of other attorneys or comparisons with them, or any kinds of statements, inferences or ambiguities that may “create illusions in potential clients or arouse unfounded hopes in them.”¹²⁹ It is further explained that, if an advocate discovers that advertisement of his work which is not in compliance with the above-stated criteria has been distributed without his knowledge, he is required to notify the council.¹³⁰

¹²³ *Id.* art. 24(1).

¹²⁴ *Id.* art. 27(1). “Persons who have a higher, unfinished higher, or middle-level legal education...may be assistants to attorneys.” *Id.* Additionally, an attorney with at least five years of experience is permitted to have interns. *Id.* art. 28(1). Interns must have a higher legal education, and internships last between one and two years. *Id.* Like an attorney’s assistants, interns are required to protect the attorney’s “secrets” and comply with the terms of their employment contracts. *Id.* art. 28(3)-(4). They are also not permitted to carry on independent legal work. *Id.* art. 28(2).

¹²⁵ *Id.* art. 27(2).

¹²⁶ *Id.* art. 27(3).

¹²⁷ *Id.* art. 27(4).

¹²⁸ KPEA art. 17(1)(1).

¹²⁹ *Id.* art. 17(1)(2)-(1)(4).

¹³⁰ *Id.* art. 17(2).

F. Independence of Judgment & Attorney-Client Relationship

“On Work” Article 7(1)(1) articulates the main principle underlying the new attorney-client relationship and lays the foundation for a duty of loyalty. It specifically states that advocates have the duty to work “honestly, rationally, and conscientiously to uphold the rights and lawful interests of [their] clients by all means not prohibited” by law.¹³¹ According to Article 25, an agreement between an advocate and his client constitutes a civil law contract.¹³² The contract should establish specific attorney’s fees, which may be based on the “amount and difficulty of the work, the length of time necessary for its completion, the experience and qualifications of the attorney, the deadlines for and degree of urgency of the work, and other circumstances.”¹³³ Advocates are not permitted to share their fees with non-lawyers, and contingency fees are generally prohibited with the exception of property disputes.¹³⁴ The Code offers a number of guidelines pertaining to managing client funds.¹³⁵ Mainly, an advocate managing his client’s funds must do so according to his client’s instructions and maintain detailed records of all transactions.¹³⁶ A client’s money should be kept in a bank unless the client chooses otherwise.¹³⁷

The Code further elaborates on and provides specific guidance regarding duties and responsibilities surrounding attorney-client relations. It emphasizes that the “professional

¹³¹ On Work, *supra* note 3, art. 7(1)(1).

¹³² *Id.* art. 25(2).

¹³³ KPEA art. 16(2). Large firms which serve businesses are more likely to charge hourly rates. SHABELNIKOV, *supra* note 52, at 11 (citation omitted). One of the largest Russian firms, located in Moscow, estimated its advocates’ hourly rate to be 135 euro; however, various firms have been quoted as stating their hourly rate is as high as 1000 euro. *Id.* at 12 (citation omitted). Fixed fees for stages of a case or the entire case are more commonly used overall. *Id.* at 11. Although these fees may seem reasonable by Western standards, legal services are unaffordable for a great section of the Russian population. *Id.* at 12.

¹³⁴ KPEA art. 16(3)-(4).

¹³⁵ *See id.* art. 16(6).

¹³⁶ *Id.* “Documents that accompany every operation with the funds of the client must contain an indication that the attorney carried out the given operation on the instructions of the client.” *Id.* Moreover, all records “must be presented to the client upon his demand.” *Id.*

¹³⁷ *Id.*

independence of the attorney is a necessary condition for trust in him”¹³⁸ and that abuse of trust is “incompatible with the calling of the attorney;”¹³⁹ so advocates must therefore avoid “actions that will likely undermine trust.”¹⁴⁰ Moreover, advocates should be careful not to “sacrifice the interests of [their] clients for the sake of friendly or any other relations.”¹⁴¹ However, the “law and morality in the legal profession shall have priority over the will of the client,”¹⁴² and an advocate cannot violate the law at the client’s request.¹⁴³ To that end, an advocate shall not be able to offer promises of a “positive outcome” of a dispute, which imply that he may use illegal means to achieve it.¹⁴⁴

G. Conflict of interest

The guidelines for issues relating to conflict of interest appear to be rather general. The Code states that advocates cannot “act against the lawful interests” of their clients¹⁴⁵ or take a position in opposition to that of their clients’, except for when the defense attorney believes his client would be incriminating himself.¹⁴⁶ An advocate also cannot publicly declare his client’s guilt.¹⁴⁷ Although an advocate cannot represent opposing parties, he may attempt to facilitate conciliation of those parties.¹⁴⁸ Furthermore, he cannot represent two defendants in the same criminal case if they have divergent interests or if “they take different positions on the same episodes of the

¹³⁸ *Id.* art. 5(1).

¹³⁹ *Id.* art. 5(3).

¹⁴⁰ *Id.* art. 5(2).

¹⁴¹ *Id.* art. 15(5). This includes relations with other attorneys which the Code states “must not influence the defense of the interests of the parties to a case.” *Id.*

¹⁴² *Id.* art. 10(1).

¹⁴³ *Id.*

¹⁴⁴ *Id.* art. 10(2).

¹⁴⁵ *Id.* art. 9(1)(1). The Code makes it clear that the attorney’s reason for acting against his client’s interests are irrelevant – he may not do so even in situations where the attorney would be acting to his own advantage or due to outside pressures. *Id.*

¹⁴⁶ *Id.* art. 9(1)(2).

¹⁴⁷ *Id.* art. 9(1)(3).

¹⁴⁸ *Id.* art. 11(1).

case.”¹⁴⁹ Once an advocate determines that a conflict is present, he must terminate representation and inform his client as soon as possible so that the client can retain a different attorney to represent him.¹⁵⁰

The “On Work” lists a number of instances when an advocate cannot accept payment for his services.¹⁵¹ Such instances include payment an advocate knows to be illegal, situations when an advocate has an independent self-interest in the case that is different from his client, when an advocate had been involved in the case as “judge or arbiter, intermediary, prosecutor, investigator, inspector, expert, specialist, or translator, if he is a victim or witness in the case, or if he has been an official whose competence included the adoption of decisions in the interests of the given client.”¹⁵² Moreover, an advocate cannot take on representation if he has familial relations with an official investigating or inquiring into the case of the client involved.¹⁵³ The Code, however, specifically provides that an advocate may take on the case “even if he has doubts of a legal character, provided that these doubts do not exclude the possibility of a reasonable and conscientious conduct of the case.”¹⁵⁴

¹⁴⁹ *Id.* art. 13(1)(1)-(1)(2).

¹⁵⁰ *Id.* art. 10(9) (“If after an attorney has accepted a commission, apart from a commission to conduct the defense in a criminal case at the preliminary investigation or in a court of first instance, circumstances come to light that would have barred him from accepting the commission, he must repudiate the agreement.”).

¹⁵¹ It is likely this rather means instances in which an advocate is unable to represent a client.

¹⁵² On Work, *supra* note 3, art. 6(4)(1)-(4)(2).

¹⁵³ *Id.* art. 6(4)(2).

¹⁵⁴ KPEA art. 7(1). However, an advocate must not accept a case if “it is absolutely hopeless and cannot lead to any consequences other than baselessly raising the client’s hopes of a favorable outcome to the case and causing him futile and unjustified expenditure of time, effort, and money, including payment for the services of the attorney.” *Council of the Chamber of Attorneys of the City of Moscow Extract from Survey of Disciplinary Practice (May 15, 2006) – Disciplinary Proceeding Against Attorney K*, STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, Sept.-Oct. 2008, at 18, 20 [hereinafter STATUTES & DECISIONS Sept.-Oct. 2008].

H. Confidentiality

The “On Work” defines the attorney’s “secrets”¹⁵⁵ or confidential information as “any information connected with an attorney’s rendering of legal aid to his client.”¹⁵⁶ Advocates cannot be subpoenaed to testify as witnesses in regards to the information obtained during representation of a client.¹⁵⁷ The Code states that the client holds his attorney-client privilege, and only the client can waive it.¹⁵⁸ However, an advocate may use the privileged information for his defense in instances of attorney-client disputes.¹⁵⁹

V. ATTORNEY REGULATIONS IN RUSSIA VS. OTHER COUNTRIES’ RULES OF ETHICS

A. ABA Model Rules & CCBE Code/Overview

In an effort to place the new attorney regulations in Russia in a more global context, this article briefly compares the overall existing language of the Code and the “On Work” to the key provisions of the ethical regulations followed by European and American attorneys. Instead of

¹⁵⁵ “Secrets” is a direct translation of the Russian “*sekreti*.” However, within the context of the Code, it is more likely the word probably means “confidential information.”

¹⁵⁶ On Work, *supra* note 3, art. 8(1). The duty of non-disclosure of information related to rendering legal aid may seem to conflict with reporting requirements imposed by other laws, such as the Taxation Code of the Russian Federation. In a recent case, an advocate argued receipts for client payments constituted “attorney’s secrets” and thus refused to provide the documents to tax inspectorate. VESTNIK KONSTITUTIONNOGO SUDA ROSSIYSKOI FEDERATSII [VESTN. KS RF] [Messenger of the Constitutional Court of the Russian Federation] 2008, No. 451-O-P, *translated in* STATUTES & DECISIONS: LAWS OF USSR & ITS SUCCESSOR STATES, Nov.-Dec. 2008, at 73, 75 [hereinafter STATUTES & DECISIONS Nov.-Dec. 2008]. The Court ruled demand of documents necessary for calculation of taxes was not in itself unconstitutional. *Id.* at 78. However, it also determined “the resolution of disputes over whether a document demanded from an attorney contains information constituting an attorney’s secret...belongs to the sphere of competence of law enforcement agencies and not to that of the Constitutional Court.” *Id.*

¹⁵⁷ On Work, *supra* note 3, art. 8(2). This provision (like its corresponding provision in the Criminal Procedure Code of the Russian Federation) “serves to protect the interests of the accused and is a guarantee of the defender’s unimpeded performance of his functions.” ROSSIYSKAYA GAZETA [ROS. GAZ.] Mar. 6, 2003 (Russ.), *translated in* STATUTES & DECISIONS Nov.-Dec. 2008, *supra* note 157, at 40. Note that, in regards to the Criminal Procedure Code, the Constitutional Court has found the provision does not “exclude [an advocate’s] right to give corresponding testimony in instances in which the attorney himself and his client have an interest in the disclosure of certain information.” *Id.* at 42.

¹⁵⁸ KPEA art. 6(3).

¹⁵⁹ *Id.* art. 6(4).

selecting a few European countries, the author chose to compare the attorney regulations in Russia to the key ethical provisions stated in the Code of Conduct for European Lawyers (“CCBE Code”).¹⁶⁰ The Council of Bars and Law Societies of Europe (CCBE) was initially created in 1960 as a result of the 1957 Treaty of Rome.¹⁶¹ The purpose of the treaty was to specifically facilitate agreements between the legal professions in a number of European countries, and the CCBE became the official representative for the legal profession in the European Economic Area (EEA) and the European Union, which includes approximately 700,000 attorneys overall.¹⁶² The work on the ethical rules governing lawyers, compiled in the resulting CCBE Code, began in 1982.¹⁶³ In 1988, the CCBE Code was finally approved by the European Economic Community (EEC).¹⁶⁴

Although the CCBE Code itself is not officially binding, most EEC countries have adopted it as their law.¹⁶⁵ In that respect, the CCBE Code is similar to the ABA Model Rules of Professional Conduct,¹⁶⁶ which are also merely advisory but have become binding as a result of

¹⁶⁰ For a discussion of rules governing the legal professions of individual member states, see BRUNO NASCIMBENE, *THE LEGAL PROFESSION IN THE EUROPEAN UNION*, 61-233 (Andrea Biondo ed., 2009).

¹⁶¹ Terry, *supra* note 7, at 5. The Treaty of Rome created the European Economic Community (EEC). *Id.*

¹⁶² Oskar Riedmeyer, *International Cooperation Between Lawyers* 2, <http://www.docstoc.com/docs/3828379/Code-of-Conduct-for-Lawyers> (last visited June 20, 2010). The CCBE contains twenty-eight delegations with their members nominated by the regulatory bodies in twenty-five European states that are members and three other countries that represent the European Economic Area (EEA). *Id.* In addition, observer delegations include the Bars of Switzerland, Bulgaria, Romania, Croatia, Former Yugoslav Republic of Macedonia, Ukraine and Turkey. *Id.* These “observer” countries also chose to participate in the regulation of transnational legal practice offered by the CCBE Code. Terry, *supra* note 7, at 13-14. The CCBE represents the legal profession before the European Court of Human Rights, the European court of Justice, and the European Commission. John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 *FORDHAM INT’L L.J.* 673, 673 n.1 (1991-92).

¹⁶³ Terry, *supra* note 7, at 7.

¹⁶⁴ *Id.* at 9. The most recent amendments to the CCBE Code were made in May 2006. Laurel S. Terry, *A “How To” Guide for Incorporating Global and Comparative Perspectives in the Required Professional Responsibility Course*, *ST. LOUIS U. L.J.* 1135 (2006-2007) (citing CCBE CODE, *supra* note 6). Interestingly, prior drafts of the CCBE Code are not available to the public (unlike drafts of the ABA Model Rules). *Id.* (citation omitted).

¹⁶⁵ Terry, *supra* note 7, at 12-13.

¹⁶⁶ See MODEL RULES OF PROF’L CONDUCT (2010). The CCBE Code contains an “Explanatory Memorandum,” which is very similar to the commentary that follows the ABA Model Rules. Terry, *supra* note 7, at 14.

most U.S. states' adoption of the Model Rules as part of their law.¹⁶⁷ The CCBE Code's purpose is to govern only transnational / cross-border legal practice and conflict of law issues; it does not govern a lawyer's ethical practice in his home country but is rather meant to apply in instances where an attorney practices in a different jurisdiction / host country from the one he is licensed in and it is unclear which ethical standard should govern.¹⁶⁸ The CCBE Code resolves this potential conflict by offering a uniform ethical standard that applies in such instances.

This article will compare the new attorney ethics regulations in Russia to those stated in the CCBE Code because, unlike the ethical framework and its nuances that pertain to a specific country and are not necessarily representative of the ethical values of a larger community, the CCBE Code arguably expresses the overall ethical standards agreed upon and accepted by the majority of attorney governing bodies in Europe. As such, a comparison to those provisions allows the author of this article to analyze, comprehend and offer perspective on the overall focus of the new attorney regulations in Russia and determine whether it is following a more global trend of development in the field or merely reflects the specifics of law practice in Russia, which are deeply rooted in the country's historic and socio-economic developments.

In addition to the CCBE Code, the new attorney regulations in Russia are compared to the key language and provisions of the ABA Model Rules,¹⁶⁹ which will allow this article to

¹⁶⁷ California is the one state that has "never fully embraced" the ABA Model Rules. STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION 8 (2009). Differences between states' rules and the ABA Model Rules can be seen most significantly in the areas of conflict of interest, advertising and solicitation, and protection of client confidences. *Id.* For a list of states that have adopted the Model Rules of Professional Conduct, see http://www.abanet.org/cpr/mrpc/alpha_states.html.

¹⁶⁸ CCBE CODE, *supra* note 6, R. 1.3. It is interesting to note "[t]here is hope to build on what has been done and to develop a code of professional conduct that will apply to the cross-border activities of lawyers from all the countries which are signatories to the General Agreement on Tariffs and Trade ("GATT"). Toulmin, *supra* note 163, at 674-75.

¹⁶⁹ The first version of the Model Rules of Professional Conduct was adopted in 1983, and the Rules have since been amended in 1987, 1989, 1990, 1992, 1993, 1994, 1995, 1997, 1998, 2000, 2002, 2003, 2007 and 2009. Materials for Research in Legal Ethics, www.abanet.org/cpr/ethicsresearch/resource.html (last visited June 5, 2010) [hereinafter Materials]. Substantial modifications were made in August, 2001 as well as in February and August of 2002.

determine whether the new developments in Russian legal ethics in any way resemble or follow the American standards for its ethical practice of law. Numerous law review articles have previously addressed, outlined and analyzed the provisions and key components of both the CCBE Code and ABA Model Rules.¹⁷⁰ As such, this article does not engage in a similar in-depth analysis of either source. Instead, the purpose of the comparison offered here is to only focus on the differences and similarities between the language and applicable provisions of both the CCBE Code and ABA Model Rules and the new attorney regulations in Russia with an eye towards a better understanding of the overall focus and trend in the development and current status of legal ethics in Russia.

B. Comparative Analysis of the Russian Code, CCBE & ABA Model Rules

Although the major differences between the common law and civil law legal systems are reflected in the ABA Model Rules and CCBE Code,¹⁷¹ one scholar argues that, “despite

THOMAS D. MORGAN & RONALD D. ROTUNDA, 2010 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1 (2010). Notably, in August, 2003 Rule 1.6 and Rule 1.13 were amended in response to the Enron debacle. *Id.*

¹⁷⁰ For discussion of the CCBE Code, see Riedmeyer, *supra* note 163; Terry, *supra* note 7, at 17-45; Lauren R. Frank, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 U. ILL. L. REV. 957, 959-84 (2000); Toulmin, *supra* note 163. For discussion of the ABA Model Rules, see Frank, *supra*, at 959-84; Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002).

¹⁷¹ The judicial decisions in civil law are based on written codes and statutes and, unlike in the common law, judicial decisions theoretically play no role in judicial decisions as “lower courts are generally at liberty to disregard the decisions of a higher court.” Olga Pina, *Systems of Ethical Regulation: An International Comparison*, 1 GEO. J. LEGAL ETHICS 797, 800 (1987-88). In the civil law system, lawyers have less of an opportunity to “represent facts subjectively,” unlike the common law legal systems, where attorneys argue for a desired outcome by establishing analogies or distinctions from the facts in other decided precedents. *Id.* Another important difference between the two systems is the adversarial nature of the common law system versus the ‘inquisitorial’ character of the civil law one. *Id.* at 809. As such, a lawyer in common law system is mainly his client’s fiduciary and representative, while a civilian attorney is also a part of the legal system itself with a stronger focus on him being an officer of the court. *Id.* In fact, these differences are easy to observe as the civilian lawyers wear a professional’s robe when presenting in court, while a common law attorney just wears a regular suit, thereby resembling his client’s appearance rather than that of a judge. *Id.*

One author, for example, discusses other specific differences, including the way each system treats alcoholism addicting by attorneys. *Id.* at 803. In the United States, the punishment is attached to a specific violation that was induced by the alcoholism, not the addiction to alcoholism itself. *Id.* However, in Spain for example, attorneys who

differences in legal systems, practices and procedures, lawyers throughout the world have laid down for themselves substantially the same standards of legal ethics.”¹⁷² On some level, that is true, as most ethical guidelines for lawyers all over the world contain some general language amounting to aspirations of high morals, honesty and proper treatment of clients. In fact, all three sets of ethical guidelines – the ABA Model Rules, CCBE Code and the Russian regulations – recognize a lawyer’s duty to the profession,¹⁷³ clients¹⁷⁴ and the court.¹⁷⁵ However, significant differences in the language and underlying purposes of all three sets of guidelines can be observed through a comparative analysis. For example, the CCBE Code and the Russian Code contain much broader language than the ABA Model Rules, which provide specific directions for American lawyers on most topics.¹⁷⁶ To that end, the CCBE and the Russian codes seem to leave more room for discretion of the disciplinary body in instances where a lawyer may have acted unethically given that the standards themselves are more general and, even arguably, vague.¹⁷⁷

have been found to be under the influence of alcohol while involved in some type of law-related function, are subject to the highest possible sanction. *Id.*

¹⁷² SIR THOMAS LUND, PROFESSIONAL ETHICS 18 (1970). *But see* Mary C. Daly, *What Every Lawyer Needs to Know About the Civil Law System*, 1998 PROF. LAW. SYMP. ISSUES 37, 46 (1998) (explaining that while both civil and common law systems recognize standards related to independence, integrity, and confidentiality, the difference in the U.S. is that the meaning of these terms has been “fleshed out” by disciplinary decisions, court rulings, academics, and state bar committees). The standards in civil law countries lack a “comparable gloss.” *Id.*

¹⁷³ On Work, *supra* note 3, art. 4(1); KPEA art. 10(1); CCBE CODE, *supra* note 6, R. 5.1; *see* MODEL RULES OF PROF’L CONDUCT R. 8.1-8.5 (2009) (representing rules which are relevant to “maintaining the integrity of the profession”).

¹⁷⁴ On Work, *supra* note 3, art. 7(1)(1); MODEL RULES OF PROF’L CONDUCT RS. 1.7(b), 1.8 (2009); KPEA art. 8; CCBE CODE, *supra* note 6, R. 2.7.

¹⁷⁵ MODEL RULES OF PROF’L CONDUCT R. 3.3 (2009); KPEA art. 12; CCBE CODE, *supra* note 6, R. 4.

¹⁷⁶ For example, the ABA Model Rules address duties to and possible conflicts of interest pertaining to former, prospective, and current clients separately and details situations in which a conflict may arise. *See* MODEL RULES OF PROF’L CONDUCT RS. 1.9, 1.18, 1.8 (2009). However, the CCBE discusses on a wider scope, simply stating that an attorney may not provide representation “if there is a conflict” but failing to provide details on what exactly constitutes a conflict. CCBE CODE, *supra* note 6, R. 3.2.1. Although the CCBE mentions protecting former clients, it still does not provide guidance on what is considered sufficient protection. *See* CCBE CODE, *supra* note 6, R. 3.2.3. The Russian rules remain general as well, stating only that an advocate may not represent two parties who have “divergent interests.” KPEA art. 11(1).

¹⁷⁷ For example, an advocate is not permitted to “impose his aid on persons...” KPEA art. 9(6). The Council determined this article was violated by a retainer agreement requiring a party to provide compensation should he

A major similarity between the CCBE Code and the Russian Code lies in that the main focus of all stated rules is to ensure proper fulfillment of the attorney's obligations and responsibilities to the profession and society, rather than the client. In contrast, the main role of an American attorney lies in providing a zealous service to his client, who is viewed as more important than any of his other responsibilities. Accordingly, the gist of the ABA Model Rules is centered on the attorney as his client's fiduciary and advocate, while the CCBE Code and the Russian Code mainly address the obligations of a lawyer as a member of the profession, society and an overall representative of the legal system and courts. To engage in a more detailed analysis of the scope of the ABA Model Rules, CCBE and the Russian Codes, this article will first compare the three documents using a three-prong test that was specifically created to uncover major differences in various types of ethical regulations. Second, it will focus on comparing specific language and provisions of the three sources. Finally, it will analyze and explain resulting differences and similarities.

a. The Three-Prong Test

In her article "Systems of Ethical Regulation: An International Comparison," Olga Pina set forth the three major factors outlining ethical differences between the common law and civil law legal systems.¹⁷⁸ These factors involve the "level of control by the government, the freedom granted to lawyers in the organization of their practice, and contingent fee arrangements."¹⁷⁹ This article applies the three factors to the language and applicable provisions of the new

decide to terminate the agreement prematurely. *Council of the Chamber of Attorneys of the City of Moscow Extract from Survey of Disciplinary Practice (January 17, 2006) – Disciplinary Proceeding Against Attorney K*, STATUTES & DECISIONS Sept.-Oct. 2008, *supra* note 155, at 4, 10. It found, by restricting the client's unconditional right to abrogate the agreement with his attorney, the attorney thus imposed his aid on the client. *Id.* at 9.

¹⁷⁸ See Pina, *supra* note 172, at 809 (suggesting the adversarial nature of common law systems versus the inquisitorial nature of civil law systems is a "difference which goes to the very nature of each system...and underlies three ethical differences between [them].").

¹⁷⁹ *Id.* at 809-10.

attorney regulations in Russia in order to determine where it stands in relation to its American and European counter-part.

1. Level of Control by the Government

The first prong of the test asks the question: to what extent, if any, is the legal profession in a given country self-regulating and independent?¹⁸⁰ The essential issue is whether the government has control over lawyers' power via regulations or other mechanisms and whether there is any type of recourse in instances where the government is dissatisfied with the legal profession's direction. There is no question that, of the three systems discussed, the legal profession in the United States is the most self-regulated, and thus American attorneys enjoy the highest degree of professional independence.¹⁸¹ The legal profession in the U.S. is directly regulated by each state's licensing board with the state supreme court being the highest authority. European lawyers, however, often have some outside restrictions on their professional practice. For example, Spanish lawyers have "some very specific limitations established for them by law directly,"¹⁸² rather than by their professional governing body,¹⁸³ while French lawyers, although to a lesser degree, still experience more restrictions upon their professional practice than American lawyers.¹⁸⁴ Olga Pina argues that the professional regulation of attorneys in France and Spain shows a "greater degree of suspicion towards lawyers and a greater desire to limit their

¹⁸⁰ *Id.* at 809.

¹⁸¹ *See id.* at 810 (discussing that the profession is more self-regulating in the United States than it is in both Spain and France).

¹⁸² *Id.*

¹⁸³ Spanish governing bodies are called "Colegios de Abogados." *Id.* at 801. They are set up on a regional level and can be considered the "Spanish equivalent of bar associations." *Id.* Although Spanish laws apply some very direct regulation of attorneys, the Colegios do still promulgate ethical standards for their respective regions. *Id.* Moreover, the Colegios have the power to administer disciplinary procedures and sanctions. *Id.*

¹⁸⁴ *Id.* at 810. For a detailed discussion of the professional regulations of attorneys in Spain and France, see *id.*, section II.

power.”¹⁸⁵ The level of government control easily ties to the issues of overall trust and professional independence.

An argument can be made that a “general distrust of lawyers’ ‘manipulative powers” can be observed in civil law legal systems in the way their codes reflect “distrust of oral evidence as presented by litigators and in the greater role given to the judge as director of the courtroom.”¹⁸⁶ To bolster this argument, a number of examples can be offered to show the distrust towards lawyers reflected in both the CCBE Code and Russian regulations. First, both sets of regulations prohibit clients from waiving a conflict of interest for the attorney.¹⁸⁷ That suggests attorneys are not trusted to balance the appropriate interests and act professionally when a conflict exists. Second, both codes oppose “incompatible” occupations.¹⁸⁸ This restriction further suggests that allowing attorneys to expand their services to fields other than law may make it much more difficult for licensing bodies to oversee them. In turn, this would potentially allow lawyers to function outside of the established norms of professional ethics. One can further argue that this

¹⁸⁵ *Id.* at 810.

¹⁸⁶ *Id.*

¹⁸⁷ See On Work, *supra* note 3, art. 6(4); KPEA art. 11(1); CCBE CODE, *supra* note 6, R. 3.2. But see Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT’L L.J. 1239, 1289 (1998). However, one should be cautious of reading this provision in the CCBE Code too restrictively. *Id.* The countries following the CCBE Code do not interpret “conflicts of interest” as broadly as it is understood in America. *Id.*; see also Frank, *supra* note 171, at 974 (stating that, because of the narrow way European lawyers interpret “conflicts of interest,” client consent is not a “real issue” (citation omitted)). Therefore, the conflicts contemplated in the CCBE Code are similar to those which cannot be waived even under the ABA Model Rules. Daly, *supra*, at 1289. The inability to waive conflicts under the CCBE Code reflects trust and confidence in a lawyer’s ability to recognize a conflict of interest and voluntarily decline representation. *Id.* Note also that civil law supersedes professional regulations and may introduce “countervailing duties of confidentiality” and permit waiver in certain situations. Hans-Jürgen Hellwig, *At the Intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulations*, 27 PENN. STATE. INT’L L. REV. 395, 396 (2008).

¹⁸⁸ On Work, *supra* note 3, art. 2(1). The CCBE does not explicitly say this, but rather states that attorneys should follow rules of the home state while still suggesting it is inappropriate. CCBE CODE, *supra* note 6, R. 2.5. What is considered to be an incompatible activity varies between CCBE Member States. Julian Lonbay, *Lawyer Ethics in the Twenty-first Century: The Global Practice Reconciling Regulatory and Deontological Differences – The European Experience*, 34 VAND. J. TRANSNAT’L L. 907, 912 (2001). Some merely require members of the legal profession maintain “good character.” *Id.* (citation omitted). Others, such as Belgium, prohibit employment of attorneys in business on the basis that it interferes with their independence and the dignity of the profession. *Id.* (citation omitted). Note that “this distrust of a lawyer who combines legal practice with involvement in a business enterprise is not embraced by the American legal system.” Pina, *supra* note 172, at 810.

provision also shows lawyers' inability to maintain an honest balance, this time as it pertains to different interests and occupations.

The Russian regulations are even more stringent with the "On Work" stating that lawyering is "not an entrepreneurial activity"¹⁸⁹ and restricting advocates from any business-related employment other than "scholarly, lecturing or other creative work."¹⁹⁰ Examples of prohibited activities involve "selling goods, fulfilling tasks, or rendering services."¹⁹¹ That regulation deprives lawyers of any business-related opportunities and requires a 100% commitment to "pure" lawyering. Among other explanations, this restriction can be seen as Russia's attempt to prevent lawyers from engaging in any business-related corruption that is a serious problem for Russian society today,¹⁹² as well as to emphasize attorneys' professional independence and improve their poor image that was established during the Soviet era. This view is supported by the fact that President Medvedev listed corruption as a key issue he plans to confront while signing an anti-corruption legislation packet into law in 2008.¹⁹³ Moreover, the prohibition of other occupations forces lawyers to stay truly focused on their law practice as they will avoid becoming distracted by other activities that could interfere with their independence and professional judgment.

Mandatory malpractice insurance requirements stated in both the CCBE and Russian Codes further prove the lack of trust in attorneys' services and show that client protection is

¹⁸⁹ On Work, *supra* note 3, art. 1(2).

¹⁹⁰ *Id.* art. 2(1). For a discussion of the prohibitive nature of this provision, see Iurii Samkov, *Ne dumai o dokhodakh, advokat! [Don't Think About Making Money, Attorney!]*, 18 NOVAIA ADVOKATSKAIA GAZETA 35 (2008), translated in STATUTES & DECISIONS July-Aug. 2008, *supra* note 72, at 68.

¹⁹¹ KPEA art. 9(3).

¹⁹² Out of 180 countries, Russia ranked 147 on the 2008 Corruption Perception Index published by Transparency International. Carol M. Welu & Yevgenya Muchnik, *Corruption: Russia's Economic Stumbling Block*, BUS. WK., Aug. 27, 2009, http://www.businessweek.com/globalbiz/content/aug2009/gb20090827_771618.htm. Bribes remain a significant problem in the country, with an estimated fifty percent of demands coming from police or military personnel and forty-one percent coming from government officials or employees. *Id.*

¹⁹³ Welu & Muchnik, *supra* note 193. Although Russia did see promise in the form of initiation of investigations and trying of bribery cases in early 2009, critics point out a major issue with the new legislation is that it only criminalizes completed bribes and not the offering of bribes. *Id.*

critical.¹⁹⁴ These requirements promote societal trust in the legal system by assuring clients that they will be protected even if malpractice occurs. In addition, these requirements can be explained as creating a lack of freedom of choice for attorneys, i.e. their inability to decide whether to take a risk or ensure their professional services. Similarly, such regulations leave no choice for the client because he is unable to retain the professional services of an attorney who does not carry malpractice insurance. If there were no such provisions, the client would be able to decide for himself whether or not to hire a lawyer who does not carry malpractice insurance. In contrast, the ABA Model Rules do not require attorneys to carry malpractice insurance, allow waiver of conflict of interest with a client's consent¹⁹⁵ and do not prohibit "incompatible occupations," as evidenced by the fact that American lawyers frequently take part in businesses, serve as trustees or organizations' board members and work in various non-lawyer capacities.¹⁹⁶ These distinctions once again emphasize the differences between the civil and common law systems – the attorney in a common law system is given more independence from government or any other type of control and greater trust is placed in his ability to act ethically. A major emphasis is put on the attorney acting as his client's zealous advocate, and the client's wishes and choices are the center of the attorney-client relationship.

¹⁹⁴ Both "On Work" and the CCBE specifically require the attorney to "insure for risk to his professional property liability." On Work, *supra* note 3, art. 7(1)(6); CCBE CODE, *supra* note 6, R. 3.9. *But see* MODEL RULES OF PROF'L CONDUCT R. 1.15 cmt. 6 (2009) (stating that a lawyer's fund for client fund for protection may be set up to reimburse clients negatively impacted by dishonest attorneys).

¹⁹⁵ MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2009).

¹⁹⁶ It is quite common to find a lawyer serving as Chief Executive Officer (CEO) of a company in the United States. For example, Kenneth I. Chenault (CEO of American Express), Richard D. Parsons (former CEO of Time Warner), and Sumner M. Redstone (former CEO of Viacom) are all attorneys. Mike France with Louis Lavelle, *A Compelling Case for Lawyer-CEOs*, BUS. WK., Dec. 13, 2004, http://www.businessweek.com/magazine/content/04_50/b3912101_mz056.htm. In fact, the lawyer-CEOs who were interviewed listed several skills learned in law school which helped in their capacities as business leaders, such as "the ability to mediate disputes, see both sides of complex issues, and cut self-satisfied experts down to size." *Id.* However, due to the lack of business training experienced by many lawyers, risk aversion and inadequate financial expertise may be a source of problems. *Id.* Lawyer-CEOs have tended to migrate towards the airline, utilities, and financial services industries (areas in which "legal issues have a greater effect on profits..."). *Id.*

As discussed, Russia is now developing a new path leading to the independence of its attorneys. A major step towards that goal was the profession's liberation from the strong influence and control of the government exercised through the Ministry of Justice, which was the sole administrator of the legal profession under the Soviet State. The creation of an attorney ethics code is certainly another important step in that direction. However, it is critical to understand that these are still baby steps in comparison to the systems in the United States and even Europe. First, the new Code in Russia was created by the All-Russia Congress of Attorneys "in accordance with the requirements envisioned" by the "On Work," a federal law that was adopted by State Duma.¹⁹⁷ As such, the new Code was drafted in response to and in compliance with a government initiative. This process of attorney regulation is very different from the American Bar Association promulgating its own professional guidelines and regulations by drafting and revising numerous versions of the Model Rules and its predecessors over the years.¹⁹⁸ It is also unlike the development of the CCBE Code, where a professional organization – the Council of Bars and Law Societies of Europe – was created to draft attorney regulations for its members. Instead, the All-Russia Congress of Attorneys convened to facilitate the task given by the government via federal law and draft the new code of legal ethics. Obviously, the Russian legal profession is not as independent as its American and European counterparts. However, this was still a huge step for Russia.

¹⁹⁷ KPEA pmbi.

¹⁹⁸ The United States has the "oldest practice of using written rules to govern the ethics of lawyers." Ronald D. Rotunda, *Legal Ethics, the Czech Republic and the Rule of Law*, 7 PROF. LAW. 1, 4 (1996). A Maryland lawyer drafted a set of fifty ethical guidelines in 1836. *Id.* These guidelines were then used as the basis for a series of lectures on lawyers' duties in 1854. *Id.* Alabama used these lectures as a model for the state's ethical code (adopted in 1887) which eventually influenced the ABA Canons of Professional Ethics. *Id.* The Canons of Professional Ethics were adopted in 1908 and served as the first set of ethical standards for all lawyers in the United States. ABA Canons of Professional Ethics Centennial, <http://www.abanet.org/cpr/centennial.html> (last visited June 5, 2010). The Model Code of Professional Responsibility replaced the Canons in 1969. *Id.* Finally, the ABA Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association in 1983. *Id.* The ABA Model Rules have since been amended thirteen times. Materials, *supra* note 170.

The whole concept of attorney ethics is very much a new phenomenon in Russia, unlike in the United States, where ethical regulations for attorneys have been in effect for over one hundred years.¹⁹⁹ Most importantly, a major distinction between legal ethics in Russia and the United States or Europe lies in that, unlike those countries, only a part of the profession is subject to attorney regulation in Russia. As discussed, the above-described detailed ethical regulations only apply to advocates, not to jurists.²⁰⁰ Accordingly, one can still practice civil law as a jurist and not have to answer to any governing professional body or follow any applicable ethical regulations.²⁰¹

2. Freedom to Organize Practice

As with many other aspects of lawyering, American attorneys are generally²⁰² not limited regarding the type of practice they may have in terms of the size of their law firm or how their practice should be set up.²⁰³ The civil law countries, on the other hand, often limit the firm size and dictate the number of lawyers that can and cannot join together in one practice.²⁰⁴ Arguments have been made that these restrictions are an attempt to “limit the power of attorneys in society, and to prevent the profession from becoming more like a business.”²⁰⁵ Russia’s restrictions on the types of permissible practice certainly contrast to those of the United States and are even more restrictive than those in Europe. As discussed above, “On Work” specifically

¹⁹⁹ See CANONS OF PROF’L ETHICS (1908) (representing the ABA’s first official set of ethical guidelines for lawyers).

²⁰⁰ SHABELNIKOV, *supra* note 52, at 4.

²⁰¹ “[A]dvocates do not have a monopoly in non-criminal cases, and civil legal assistance may be provided basically by anyone having a power of attorney from the client.” *Id.* at 17.

²⁰² The only restriction under the Model Rules is to not form a partnership with a non-lawyer. MODEL RULES OF PROF’L CONDUCT R. 5.4(b) (2009).

²⁰³ See Pina, *supra* note 172, at 811 (“Some critics have observed that the structure of the large firms interferes with the idea of professional independence and the lawyer’s duty to zealously work for her client and act in her client’s best interest.”).

²⁰⁴ *Id.* at 810. For example, Spain and France restrict the number of attorneys able to join a law firm, thereby avoiding establishment of big law firms. *Id.* Spain has a twenty attorney firm limit. *Id.*

²⁰⁵ *Id.* at 811.

explains the types of law firms or other arrangements that are appropriate for an advocate's legal practice.²⁰⁶ As such, advocates have to comply with these restrictions and are not free to set up their firm in any way they desire.

In order to explain these differences, an argument can be made that, even though the goal is to encourage attorney independence in Russia, the ethics code is still very new and the country is still working on its transition from a totalitarian regime where lawyers had no effective authority, ethics or independence. As a result, Russia's idea of professional independence is still very different from that of the United States, which has been a democratic society for many years. Moreover, it is important to remember that these regulations pertain to the advocates only, thereby making the overall progress appear even less significant. It appears that no specific restraints can apply to the size and type of practice of jurists, for example, since no official regulation is imposed on them.²⁰⁷ Once again, Russia's ethical regulations are starting with just a fraction of the profession; however, despite being more than substantial for Russia, they are arguably limiting in a more global sense and do not leave Russian advocates as much freedom as is enjoyed by American attorneys.

3. Contingent Fee Arrangement

Another potential difference between civil and common law systems lies in that contingency fees have been historically prohibited by many civil law countries while they are

²⁰⁶ See *supra* Part IV.D.

²⁰⁷ An attempt to rectify the problem of unregulated lawyers was first made in September 2008. SHABELNIKOV, *supra* note 52, at 18. The Joint Commission on Issues of Qualified Legal Assistance drafted its law "On the Provision of Qualified Legal Assistance" which gives a monopoly on "all and any legal services, including legal advice" to advocates. *Id.* However, the draft received criticism from the community of unregulated lawyers as well as the Presidential Administration. *Id.* at 19. "In practical terms, it appears to be unrealistic to expect that the vast majority of 'unregulated lawyers' with their own traditions and significant lobbying powers, will easily accept such imposed regulation." *Id.* This definitely reflects that the fragile state of the idea of ethical regulation of lawyers in Russia.

generally permitted in a number of common law jurisdictions,²⁰⁸ such as the United States. In the United States, contingency fees are allowed except for in divorce and criminal proceedings.²⁰⁹ The CCBE Code specifically prohibits contingency fees altogether.²¹⁰ However, it does permit bar-approved fee schedules.²¹¹ Here, Russia also follows the civil law trend and prohibits contingency fees.²¹² The rationale for this prohibition in civil law systems relates to the view that attorney's professionalism consists of a "balance between the social mission of protecting the client, and the duty to society at large."²¹³ In civil law systems, "professionalism is viewed as depending on being separate from the client."²¹⁴ Accordingly, "if a lawyer's remuneration were dependent on the success of his client's case, the scales would be tipped in

²⁰⁸ See JAMES MOLITERNO & GEORGE HARRIS, GLOBAL ISSUES IN LEGAL ETHICS 58-80 (2007) (discussing the issue of attorney's fees in civil versus common law jurisdictions and offering examples of specific countries); see also Pina, *supra* note 172, at 813. Some scholars suggest "[t]he social choice of fee systems...reflects a social preference for emphasis on different duties." Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 300 (1999). It is also proposed the permitted fee arrangements have heavy influence on how fair the public perceives a particular justice system. *Id.* at 302.

²⁰⁹ MODEL RULES OF PROF'L CONDUCT R. 1.5(c)-(d) (2009). Law and economics literature suggests that the contingent fee arrangement encourages a lawyer to maximize his client's interests. Maurer et al., *supra* note 209, at 280 n.25. This belief may explain why the United States, with its view of the lawyer as a zealous advocate, has been more accepting of the contingency fee. Contingency fees also gained acceptance in the United States due to the belief that this fee arrangement makes the courts more accessible to the economically disadvantaged. *Id.* at 293 n.63 (citation omitted). In general, attorneys take twenty to fifty percent of the client's award. *Id.* at 305. Some states have set a maximum percentage that lawyers may charge. *Id.* at 307.

²¹⁰ CCBE CODE R. 3.3.1. Distrust toward contingency fees existed even prior to the promulgation of the CCBE Code. For example, one author remarks that, under French law, the prohibition on contingency fees is "one of the very few provisions whose wording has not changed, even with respect to a comma, since the Napoleonic Code of 1804." Henri Adler, *Differences and Common Elements in Legal Ethics in France and the United States*, in LAWYERS' PRACTICE & IDEALS: A COMPARATIVE VIEW 351, 359 (John J. Barcelo III & Roger C. Cramton, eds., 1999). Some French commentators have gone as far as to say that contingent fees are "contrary to a principle essential to the morality of bars." Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 683 (1999-2000) (quoting RAYMOND MARTIN, DÉONTOLOGIE DE L'AVOCAT 250 (3d. ed. 1998)).

²¹¹ CCBE CODE, *supra* note 6, R. 3.3.3. This approach allows the lawyer to "disclaim responsibility" for the level of fee charged and may help to promote the idea of professionalism. Vagts, *supra* note 211, at 682. Another suggested advantage of fee schedules is that they provide a guarantee to law students that they will have a "decent" standard of living once they complete the lengthy and expensive process of becoming an attorney. Daly, *supra* note 188, at 1294. However, the use of fee schedules has been struck down as anti-competitive in the United States. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

²¹² KPEA art. 16(3). Although Article 16 states that the prohibition on contingency fees does not apply to property disputes, *id.*, the Russian Constitutional Court recently authorized prohibition of contingency fees in legal service contracts. Sergey Budylin, *Russia and Ukraine*, 42 INT'L LAW. 1083, 1092 (2008).

²¹³ Pina, *supra* note 172, at 813 (citing Tang Thi Thanh Trai Le, *Professional Independence and the Associate in a Law Firm: A French Case Study*, 29 AM. J. COMP. L. 647, 654 (1981)).

²¹⁴ *Id.*

favor of the client and the ideal of professionalism would not be achieved.”²¹⁵ Based on this rationale, profit making does not fit within the primary goal of the legal profession.

This argument has even more merit when applied to Russia and its restriction of contingency fees for advocates. Based on the historical distrust of the profession and an ongoing problem with corruption²¹⁶ of various professionals, it is understandable that lawyers are not trusted to recover a percentage of damages from the lawsuit. In fact, today it is critical to rebuild trust in the legal profession in Russia, and to do that, the new attorney regulations attempt to make sure there is no opportunity for even a perception of dishonesty and corruption. That is very different from the United States where the legal profession is old and established, and the lawyer is mainly seen as a zealous advocate for his client, thereby making his client’s best interest the attorney’s primary focus.

Accordingly, having applied Olga Pina’s three-prong test, the new attorney regulations in Russia appears to resemble and reflect the European civil law trend rather than the American approach to legal ethics, which makes perfect sense given that Russia is and historically has been a civil law country. Despite this resemblance, however, Russia’s approach to attorney ethics incorporates some of the unique characteristics of the country itself, its background and history, as well as the history and current status of its legal profession. To provide a thorough comparison of Russia’s new attorney regulations with those stated in the CCBE Code and ABA Model Rules and in order to further place attorney regulations in Russia into a more global

²¹⁵ *Id.*

²¹⁶ When a journalist told President Medvedev that the “level of corruption in Russia’s bureaucracy is one of the highest in the world,” President Medvedev did not become defensive and responded by that “[t]his has many causes.” Ivan Dmitriev, *Medvedev po politicheskim nigrilizmom, natsional’nye proekty “Gazproma”, i sredstva massovoĭ informatsii* [Medvedev on Political Nihilism, National Projects, Gazprom, and the Media] ROSSIISKAYA GAZETA [ROS. GAZ.], Aug. 9, 2007, <http://www.rg.ru/2007/08/10/doveritelno.html>, translated at <http://www.therussiamonitor.com/2007/08/medvedev-on-political-nihilism-national.html>. “The moral and ideological values of the Soviet Union, which departed along with communism, were not simply replaced during the 90s with European values.” *Id.*

context, the next section will take a closer look at particular language and remaining provisions of the three sets of ethical regulations.

b. Specific Language and Provisions of the CCBE, Russian Code & Model Rules

1. Purpose, nature and field of application

All three sets of ethical regulations offer general guidelines applicable to attorneys' practice and establish disciplinary provisions for potential non-compliance. They also suggest that these ethical regulations are not all encompassing and that attorneys may be subject to a broader context of regulations set forth by courts and other entities.²¹⁷ The purpose of the ABA Model Rules is to set out guidelines for regulations (imperative or discretionary) for the states to follow in addition to other rules imposed by the courts.²¹⁸ The ABA Model Rules are merely a suggestive format that becomes binding upon adoption by a specific state.²¹⁹ In contrast, the purpose of the CCBE Code is to eliminate any conflict possibly arising from "double deontology" with the goal of pointing to which specific rule should apply – rather than creating a brand new rule²²⁰ – and thereby offering a unified standard to be applied in various ethical scenarios. Similarly, the purpose of the Russian regulations is to offer a unified set of federal guidelines assembled from different sources, such as the Constitution and federal laws of the

²¹⁷ MODEL RULES OF PROF'L CONDUCT Scope (2009) ("The Rules presuppose a larger legal context shaping the lawyer's role."); KPEA art. 12 ("[W]hen participating in proceedings...an attorney must observe the norms of the corresponding procedural legislation..."); CCBE CODE, *supra* note 6, R. 1.3.2 ("[T]he lawyer will remain bound to observe the rules of the Bar or Law Society to which he or she belongs...").

²¹⁸ MODEL RULES OF PROF'L CONDUCT Scope (2009). For an example of additional rules an attorney may be subject to, see TEX. DISCIPLINARY RULES OF PROF'L CONDUCT (2005), *available at* http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96. These rules cover many topics similar those found in the ABA Model Rules, such as conflicts of interest, advertising, and candor towards the court. *See id.*

²¹⁹ Daly, *supra* note 188, at 1260.

²²⁰ CCBE CODE, *supra* note 6, R. 1.3.1.

Russian Federation.²²¹ Both the CCBE Code and the Russian regulations have provisions explaining to whom these rules apply.²²² No such provision can be found in the ABA Model Rules as American lawyers are all members of the Bar and are not divided into groups for the purposes of applying rules of ethics,²²³ while in Russia procurators, advocates, notaries and jurists, for example, represent several distinct professions.²²⁴

The CCBE Code and ABA Model Rules state the field of application for the rules,²²⁵ while the Russian regulations fail to provide such specifics. When it comes to the function of the attorney in society, the CCBE Code and the Russian regulations similarly discuss the function using broader terms and concepts such as justice, honesty and morality.²²⁶ The lawyer's duties once again seem to be more focused on his responsibilities to the legal system and legal profession as a whole, while the ABA Model Rules focus on how an attorney can meet his client's needs, including provisions discussing the representation of an organization,²²⁷ a client's waiver of conflict of interest²²⁸ and other specifics.

²²¹ On Work, *supra* note 3, art. 4(1).

²²² *Id.* arts. 4(1), 4(3); CCBE CODE, *supra* note 6, R. 1.4.

²²³ In addition to general rules of ethics that apply to lawyers licensed in a particular jurisdiction, some legal professionals are subject to additional rules. For example, judges have their own set of applicable rules of ethics. *See e.g.*, MODEL CODE OF JUDICIAL CONDUCT (2008); CODE OF CONDUCT FOR U.S. JUDGES (2009). The code adopted for U.S. judges contains five canons and commentary following each canon. *See* CODE OF CONDUCT FOR U.S. JUDGES (2009). It covers topics such as integrity, impropriety, extrajudicial activities, political activity, and a judge's responsibility to act diligently, impartially, and fairly. *See id.* The Code was first adopted in 1973 by the Judicial Conference and has since been amended seven times. *Id.* intro. It applies to circuit, district, magistrate, and bankruptcy judges as well as judges of the Court of Federal Claims and the Court of International Trade. *Id.* Prosecutors also have their own set of guidelines to abide by as well. *See* NAT'L PROSECUTION STANDARDS (2009), available at <http://www.pretrial.org/Docs/Documents/NDAA%202010%20Standards.pdf>. The standards cover six general topics: the prosecutor's responsibilities; professionalism; conflicts of interest; selection, compensation, and removal; staffing and training; and prosecutorial immunity. *See id.* The purpose of these standards is to supplement the existing rules in each jurisdiction, not replace them, and they apply to assistant and deputy prosecutors as well as the chief prosecutor. *Id.* intro.

²²⁴ *See* BURNHAM ET AL., *supra* note 14, at 131.

²²⁵ MODEL RULES OF PROF'L CONDUCT R. 1.13 (2009); CCBE CODE, *supra* note 6, R. 1.5.

²²⁶ On Work, *supra* note 3, arts. 1(1), 3(2); KPEA arts. 4(1), 8; CCBE CODE, *supra* note 6, R. 1.1.

²²⁷ MODEL RULES OF PROF'L CONDUCT R. 1.13 (2009).

²²⁸ MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009).

2. Independence, Integrity, Confidentiality and Respect

Consistent with its overall client-focused approach, the concept of attorney independence in the ABA Model Rules relates to the client and his best interests,²²⁹ explaining that the lawyer's duty to give candid advice should be based on all possible considerations which "may be relevant to the client's situation."²³⁰ The CCBE Code and Russian regulations' language relating to attorney independence is much broader. The CCBE Code merely states that an attorney should not compromise his professional standards under any circumstances,²³¹ while the Russian regulations discuss independence as a critical component for general trust in the attorney.²³² In fact, unlike the ABA Model Rules, both the CCBE Code and the Russian regulations emphasize the need for trust in the attorney,²³³ as it is critical for a successful attorney-client relationship as well as the overall trust in the profession. All rules expect the lawyer to put his client's interests above his own while still following the rules of professional ethics.²³⁴ As is the case with many other provisions, the CCBE Code and the Russian regulations use much broader general language²³⁵ than the ABA Model Rules, which provide a set of specific guidelines in that area -- another example of how the ABA Model Rules prioritize and protect the interests of the client.²³⁶

²²⁹ For example, see MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009) (addressing conflicts of interest which could inhibit an attorney's independence).

²³⁰ *Id.* R. 2.1.

²³¹ CCBE CODE, *supra* note 6, R. 2.1.

²³² KPEA art. 5. It is interesting to note that, despite this emphasis, practices prevail in Russia which seem to detract from the supposed value placed on professional independence. For example, the Lawyer's Guild in Moscow is "a pyramid-like organization" in which lawyers are subordinate to and receive their salaries from the Guild's Presidium. Alain de la Bretesche, Organisation and Administration of the Profession of Lawyer, in THE ROLE AND RESPONSIBILITIES OF THE LAWYER IN A SOCIETY IN TRANSITION 23, 27 (1999).

²³³ See KPEA art. 5; CCBE CODE, *supra* note 6, R. 2.2.

²³⁴ KPEA arts. 8(1), 15(5); CCBE CODE, *supra* note 6, R. 2.7.

²³⁵ The CCBE Code simply states that attorneys must "always act in the best interests of the client." CCBE CODE, *supra* note 6, R. 2.7. The Russian regulations say advocates should perform duties and "in a rational...and timely fashion." KPEA art. 8(1).

²³⁶ One way in which the ABA Model Rules protect the client's interests is by allowing a lawyer to represent the client despite a conflict of interest if this is the client's wish.

Notwithstanding the existence of a current conflict of interest...a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

All three sets of regulations discuss the attorney's obligation to provide diligent, competent and prompt representation to his client.²³⁷ They all suggest it can be accomplished by taking on a reasonable case load and only agreeing to take on cases that the lawyer can properly handle based on his skill and knowledge.²³⁸ All rules further protect the confidentiality of attorney-client communications by prohibiting lawyers from disclosing information related to client representation.²³⁹ Protecting confidentiality appears almost unconditional under all codes with only the ABA Model Rules providing very limited exceptions to it,²⁴⁰ thereby demonstrating the overall concern with upholding the principles and reputation of the legal profession. In addition, the Russian regulations, unlike the CCBE Code and ABA Model Rules,²⁴¹ lack any type of specific provision regarding possible disputes or reporting obligations among lawyers,

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- (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2009).

Other conflict of interest rules, such as "[a] lawyer may not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client..." and "[a] lawyer may not accept compensation for representing a client from one other than the client...", also have exceptions that enable the client's interests to ultimately prevail. *See id.* R. 1.8.

²³⁷ MODEL RULES OF PROF'L CONDUCT RS. 1.1, 1.3-1.4 (2009); KPEA art. 8.1; CCBE CODE, *supra* note 6, R. 3.1.

²³⁸ MODEL RULES OF PROF'L CONDUCT RS. 1.1, 1.3 cmt. 2 (2009); KPEA art. 9(1)(5); CCBE CODE, *supra* note 6, R. 3.1.3.

²³⁹ *See On Work*, *supra* note 3, art. 6(4)(5); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009); CCBE CODE, *supra* note 6, R. 2.3. The Russian rules specifically discuss "observation of professional secrecy is an unconditional priority of the attorney's work." KPEA art. 6(2).

²⁴⁰ *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009) (outlining six specific situations in which it may be appropriate for an attorney to reveal confidential client information, such as prevention of death or substantial bodily harm or prevention of crime). It is also interesting to note that some scholars argue the CCBE Code is not unequivocal regarding confidentiality due to the fact that "privilege" can be understood differently from country to country. Frank, *supra* note 171, at 191.

The duty of confidentiality can potentially create far-reaching consequences for attorneys. An extreme example is provided in the biographical account of American attorney Frank Armani whose client (the defendant in a 1970's murder case) told him the location of two other undiscovered victims. *See* TOM ALIBRANDI WITH FRANK ARMANI, PRIVILEGED INFORMATION (1984). Although this case took place prior to the adoption of the recent version of ABA Model Rules, Armani cites his oath of office to "maintain the confidence and preserve inviolate the secrets of [his] client" as the origin of his duty of confidentiality. *Id.* at 2. Because of this duty, Armani and another attorney on the case did not provide the information to authorities and later attempted to use it for plea bargaining purposes. *Id.* at 1. After the public learned of the story, the attorneys suffered severe societal backlash, including death threats and vandalism. *Id.* at 2-3.

²⁴¹ *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2009); CCBE CODE, *supra* note 6, R. 5.9.

which may be critical to ensure ethical violations are discovered and deals with. However, both the CCBE Code and Russian regulations offer general language suggesting the importance of mutual respect in the legal system, including cooperation between members of the legal community.²⁴² This shows a possible attempt to build a strong foundation for the legal profession, suggesting that potential disputes can be resolved.

Both the CCBE Code and ABA Model Rules address respect for rules of other bars by explaining the attorney's responsibility to comply with professional standards of other jurisdictions when engaged in transnational practice,²⁴³ while Russia offers no such provision. This raises the question of whether such omission is accidental or based on failure to anticipate or desire Russian lawyers' involvement in transnational or global law practice.

3. Termination of the attorney-client relationship, conflict of interest and fees

The Russian regulations describe the attorney-client relationship as a civil law contract,²⁴⁴ while the CCBE Code appears to characterize it the same way without specifically using the same language.²⁴⁵ The ABA Model Rules do not expressly address this issue, although, "for many purposes, the attorney-client relationship is contractual in nature."²⁴⁶ All rules discuss the attorney's ability to terminate representation of a client, with the ABA Model Rules providing more specificity than the other two codes. For example, the ABA Model Rules state that the

²⁴² KPEA art. 15(1); CCBE CODE, *supra* note 6, R. 5.1.

²⁴³ MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2009); CCBE CODE, *supra* note 6, R. 2.4; *see also* MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 2 (2009) ("A lawyer may be potentially subject to more than one set of rules of professional conduct...").

²⁴⁴ On Work, *supra* note 3, art. 25(2).

²⁴⁵ The attorney's representation is discussed in terms of "acceptance and termination of instructions." CCBE CODE, *supra* note 6, R. 3. This seems similar to the notion of taking on duties upon entering into a contractual relationship.

²⁴⁶ Robert Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Rule*, 64 ALB. L. REV. 153, 201 (2000). The ABA Model Rules discuss the lawyer's obligation to keep his client informed, consult with his client, and comply with information requests. MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2009).

lawyer “shall” terminate representation in certain instances but it also appears to leave some discretion to the lawyer by allowing termination for “other good cause.”²⁴⁷ The other two codes state in vague language that the attorney must withdraw if “circumstances come to light that would have barred him from accepting the commission”²⁴⁸ and a “lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way...that the client may be unable to find other legal assistance in time to prevent prejudice”²⁴⁹ but fail to provide any further explanation or direction regarding how to apply these guidelines. Both the CCBE Code and ABA Model Rules, however, seem to suggest that an attorney may terminate representation if the client fails to fulfill his payment obligation after having received reasonable warning,²⁵⁰ while this issue is not explicitly addressed by the Russian regulations.

In addition to what was already discussed in terms of possible waiver of the conflict of interest provisions, it is important to note that, unlike other regulations, the Russian regulations offer more specificity here by stating examples of actions that constitute a conflict of interest.²⁵¹ The regulations also have a catch-all provision that prohibits representation of two clients “in a single case who have divergent interests”²⁵² while the CCBE Code focuses on “breaches of

²⁴⁷ MODEL RULES OF PROF’L CONDUCT R. 1.16(a)-(b) (2009).

²⁴⁸ KPEA art. 10(9).

²⁴⁹ CCBE CODE, *supra* note 6, R. 3.1.4.

²⁵⁰ MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(5) (2009); CCBE CODE, *supra* note 6, R. 3.5.

²⁵¹ An attorney may not render legal aid

[I]f he has an independent interest in the substance of his agreement with the client, different from the interest of the given client; if he has taken part in the case as a judge, arbitration judge or arbiter, intermediary, prosecutor, investigator, inspector, specialist, or translator, if he is a victim or witness in the case, or if he has been an official whose competence included the adoption of decisions in the interests of the given client; if he has kinship of family relations with an official who has taken or is taking part in the investigation or inquiry into the case of the given client; if he is rendering legal aid to a client whose interests are in conflict with the interests of a given client.

On Work, *supra* note 2, art. 6(4)(2).

²⁵² KPEA art. 11(1).

confidence” and situations “where the lawyer’s independence may be impaired” but fails to provide examples of situations that would create a conflict of interest for the attorney.²⁵³

In addition to the prohibition of contingency fees, the CCBE Code contains a provision stating that “fees must be fair and reasonable.”²⁵⁴ However, a similarity exists between the ABA Model Rules and Russian regulations in that they both provide guidelines to help determine what constitutes a “reasonable” fee, discussing factors like the level of difficulty of the work, necessary length of time to complete it and others.²⁵⁵ These provisions attempt to ensure that both the attorney and his client are treated fairly: the client doesn’t pay unreasonable fees while the attorney receives appropriate compensation for his services. In fact, the Russian regulations go even further to specify essential terms and conditions in the agreement between the attorney and his client.²⁵⁶ This level of specificity is distinguished from the rest of the general language that is typical for the Russian regulations, thereby demonstrating that this aspect of attorney regulation was viewed as especially important by the drafters. All three sets of ethical guidelines prohibit fee sharing with non-lawyers,²⁵⁷ with the CCBE Code leaving the door open to possible

²⁵³ CCBE CODE, *supra* note 6, R. 3.2. One scholar suggests “the silence of the CCBE Code reflects more trust in the judgment of the lawyer and the lawyer’s ability to resist temptation.” Terry, *supra* note 7, at 55.

²⁵⁴ CCBE CODE, *supra* note 6, R. 3.4.

²⁵⁵ MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2009); KPEA art. 16(2).

²⁵⁶ On Work, *supra* note 3, art. 25(4).

The essential conditions of an agreement shall be:

- (1) indication of the attorney (attorneys) who has (have) agreed to carry out a commission as an agent (agents), and also his (their) affiliation to a legal practice and to a Chamber of Attorneys;
- (2) substance of the commission;
- (3) conditions of the client’s payment of remuneration for the legal aid rendered;
- (4) procedure and amount of reimbursement for attorney’s (attorneys’) expenses connected with carrying out the commission;
- (5) magnitude and character of the liability of the attorney (attorneys) who has (have) agreed to carry out the commission.

Id.

²⁵⁷ MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (2009); KPEA art. 16(4); CCBE CODE, *supra* note 6, R. 3.6. *But see* Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?*, 1 J. INST. FOR STUDY LEGAL ETHICS 297, 310-11 (1996) (suggesting that there may be future pressure to eliminate fee-sharing prohibitions in the United States based on arguments that they are anti-competitive).

exceptions provided by the rules of member states.²⁵⁸ The strictness of these provisions supports the emphasis on attorneys' professional independence by all three sources. Along these same lines, both the ABA Model Rules and CCBE Code explicitly prohibit referral fees to individuals.²⁵⁹ The Russian regulations, however, failed to include a similar provision despite the fact that such a provision would go along with a prohibition on fee sharing and be very helpful in further strengthening the concept of attorney independence. In addition, all three sets of guidelines reflect similar concerns pertaining to clients' funds. To that end, they all require safeguards such as that the funds be deposited in an account and proper accounting records be kept.²⁶⁰

4. Personal Publicity and Advertising

Interestingly, the Russian regulations pertaining to advertising are much more specific than both the CCBE Code and ABA Model Rules.²⁶¹ In fact, the Russian regulations emphasize that clients may sometimes be more affected by presentation tactics than the actual information about the lawyer's skills.²⁶² All three sets of ethical guidelines prohibit misleading and false advertisements and advertisements that create false hopes, illusions and unjustified expectations,²⁶³ while the Russian regulations go further by prohibiting specific evaluative

²⁵⁸ CCBE CODE, *supra* note 6, R. 3.6.1.

²⁵⁹ MODEL RULES OF PROF'L CONDUCT R. 7.2(b) (2009); CCBE CODE, *supra* note 6, R. 5.4.

²⁶⁰ MODEL RULES OF PROF'L CONDUCT R. 1.15 (2009); KPEA art. 16(6); CCBE CODE, *supra* note 6, R. 3.8. The ABA Model Rules and CCBE Code expressly require clients' funds be kept in a *separate* account. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2009); CCBE CODE, *supra* note 6, R. 3.8.1. The Russian ethical guidelines do not specifically state this. See KPEA art. 16(6).

²⁶¹ Compare KPEA art. 17(1) with MODEL RULES OF PROF'L CONDUCT Rs. 7.1-7.3 (2009) and CCBE CODE, *supra* note 6, R. 2.6. The Russian regulations specifically state that advertising must not contain "1) evaluative descriptions of the attorney; 2) testimonials of other persons about the work of the attorney; 3) comparisons with or criticism of other attorneys; 4) declarations, hints, or ambiguities that may create illusions in potential clients or arouse unfounded hopes in them." KPEA art. 17(1).

²⁶² See KPEA art. 17(1).

²⁶³ MODEL RULES OF PROF'L CONDUCT R. 7.1 (2009); KPEA art. 17(1)(4); CCBE CODE, *supra* note 6, R. 2.6.1.

descriptions, testimonials and comparisons.²⁶⁴ This type of prohibition can once again be attributed to the desire to improve the attorney's image in Russian society and to overcome the historic perception that lawyers can never be trusted. It appears that allowing lawyers to disappoint their clients via false and exaggerated stories would be counter-productive to the effort to rebuild attorney image; therefore, what appears to be an over-restrictive provision, actually makes sense in light of the history and current goals pertaining to the legal profession in Russia.

5. Legal Aid, Court, Communications with Others and Professional Development

All three codes express a general requirement that attorneys respect the court and comply with its rules,²⁶⁵ with the CCBE and Russian codes referring to “fair conduct of proceedings”²⁶⁶ and “[observing] the norms...of legislation”²⁶⁷ without explaining what is actually covered by such language. In contrast, the ABA Model Rules specifically state the type of conduct that would interfere with the fairness of proceedings, such as ex parte communications with the judge or jurors.²⁶⁸ Both the ABA Model Rules and CCBE Code prohibit an attorney from providing false or misleading information to the court, while the Russian regulations lack such specific language. Furthermore, both the CCBE Code and Russian regulations show concern for efficient resolution of disputes and preservation of judicial resources,²⁶⁹ while the ABA Model Rules do

²⁶⁴ KPEA art. 17(1). If an attorney becomes aware that advertisements of his services do not meet these rules and “[have] been spread without his knowledge,” he is required to notify the council. *Id.*

²⁶⁵ MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (2009); KPEA art. 12; CCBE CODE, *supra* note 6, R. 4.1.

²⁶⁶ CCBE CODE, *supra* note 6, R. 4.2.

²⁶⁷ KPEA art. 12.

²⁶⁸ MODEL RULES OF PROF'L CONDUCT R. 3.5 (2009); *see also id.* R. 3.4 (discussing fairness to the opposing party and counsel).

²⁶⁹ KPEA art. 7(2); CCBE CODE, *supra* note 6, R. 3.7.1.

not place much emphasis on this.²⁷⁰ This can be explained by focusing on the attorney's role in these different jurisdictions: his ultimate duty is to the court and society in the civil law system and thus he should help minimize the burden placed on the court system, while the attorney is completely independent in a common law system and is not considered a part of the court system. The ABA Model Rules do, however, discuss the attorney's aspirations for pro bono work²⁷¹ (while not making it mandatory) and also address the limited circumstances under which the attorney may refuse court-appointed representation.²⁷²

Moreover, the CCBE Code and Russian regulations suggest a need for a balance between asserting the client's rights and showing due respect for the court,²⁷³ thereby once again emphasizing that the attorney's ultimate duty is not merely to his client. In other words, the interests of the court should guide the attorney's actions as well, which is not the case in the United States, a common law jurisdiction. All three sources, however, prohibit direct communications with a represented individual unless that person's lawyer gives consent.²⁷⁴ The ABA Model Rules explain that the provision is meant to protect clients from "possible overreaching."²⁷⁵ Overall, all three sets of guidelines seem concerned with protecting clients from interference by other lawyers. This prohibition on communication also reduces the chance that clients will accidentally reveal confidential information to the opposing party.

²⁷⁰ See MODEL RULES OF PROF'L CONDUCT R. 3.2 (2009) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

²⁷¹ MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009) ("A lawyer *should* aspire to render at least (50) hours of pro bono publico legal services per year.") (emphasis added). In addition to providing services personally, attorneys "should voluntarily contribute financial support to organizations that provide legal services to persons of limited means." *Id.*

²⁷² *Id.* R. 6.2. A lawyer must accept court-appointed representation unless it is likely to cause a violation of the ABA Model Rules, put "an unreasonable financial burden" on him, or "the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." *Id.*

²⁷³ KPEA art. 12; CCBE CODE, *supra* note 6, R. 4.3.

²⁷⁴ MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009); KPEA art. 14(2); CCBE CODE, *supra* note 6, R. 5.5.

²⁷⁵ MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 (2009).

Finally, both the CCBE Code and the Russian regulations contain explicit provisions requiring lawyers to maintain and develop their professional skills and expertise.²⁷⁶ Such provisions are not mandatory in the United States, and each state has an opportunity to decide whether to require its attorneys to fulfill continuing legal education (CLE) requirements. Some states have chosen to adopt such a requirement, while others have not.²⁷⁷ This appears to be another regulation developed with the goal of increasing societal trust in the legal profession in Russia. Contrastingly, the legal profession is very old and well-established in the United States, and therefore most people would arguably assume an attorney has knowledge and skill. The requirements under the CCBE Code and Russian regulations, however, take this step to further assure the client (and possibly other professionals) that his counsel is competent.

c. What is Lawyering: Business or Profession?

Although no code specifically mentions this issue, it is interesting to observe how the ethical framework for each of the three sets of ethical guidelines reflects each jurisdiction's perception of lawyering either as a business venture or independent profession.²⁷⁸ The

²⁷⁶ On Work, *supra* note 3, art. 7(1)(3); CCBE CODE, *supra* note 6, R. 5.8.

²⁷⁷ For example, Texas requires credits for CLE on an annual basis. Minimum Continuing Legal Education, http://www.texasbar.com/Template.cfm?Section=Minimum_Continuing_Legal_Ed (last visited June 5, 2010). However, Washington D.C. does not have any mandatory CLE requirements. CLE Obligations for D.C. Bar Members, http://www.dcbbar.org/for_lawyers/continuing_legal_education/mcle_credit/obligation.cfm (last visited June 5, 2010). As another example, Illinois just recently began requiring CLE credits in 2008. Illinois MCLE Board: Purpose and History, <http://www.mcleboard.org/purpose-history.htm> (last visited June 5, 2010).

²⁷⁸ "Since as early as 1875, the legal community has grappled with the issue of 'business' versus 'profession.'" Laurie Hatten-Boyd, *Ebbs and Tides and Water Rise – What's the Real Concern with MDPs?*, 53 TAX LAW. 489 (2000) (citation omitted). One way of looking at this distinction is to consider the typical understanding of each word outside of a legal context. "Professions are distinguished from businesses in that the professional relationship is one in which the professional holds considerable power, as a result of knowledge over the individual...placing the [individual] in a vulnerable position." David A. Nash & William R. Willard, *Profession or Business?*, 135 J. AM. DENTAL ASS'N. 21, 21 (2004), available at <http://jada.ada.org/cgi/reprint/135/1/21>. However, in a classical business relationship, "the proprietor of the business and the customer are generally in comparable power positions....The primary motivation of the business owner is to make money...." *Id.* In summary, "the underlying principle of professionalism is the belief that a professional is not unduly influenced by fluctuations in a free market and, instead, responds to higher societal values – at times to the detriment of his or her own self-interest." Hatten-Boyd, *supra*, at 489 (citation omitted).

discussion of this particular issue alone could be a subject of a separate law review article²⁷⁹ as an “extensive body of literature on professionalism” is available, “running from Max Weber through Talcott Parsons.”²⁸⁰ That is, however, not the purpose of this article. This article briefly applies some factors set forth in Professor Vagts’ discussion of the business-versus-profession²⁸¹ view of lawyering, as well as raises additional observations, to support its position that the CCBE Code²⁸² and Russian regulations mainly perceive lawyering as a profession, while the ABA Model Rules take more of a business approach to it.²⁸³ It is critical to remember that each jurisdiction is likely to have some “contradictory impulses in situating itself along the continuum between the strictly business/economics and the strictly professional”²⁸⁴ and thus there is no true black or white answer at the end, but rather one can arrive at a conclusion that is logical in light of the overall analysis of specific attorney regulations.²⁸⁵

²⁷⁹ See Vagts, *supra* note 211, at 677 (discussing the issues of lawyering as business versus profession in different countries and providing a thorough comparative analysis of various attorney regulations).

²⁸⁰ *Id.* at 679.

²⁸¹ See *id.* at 677.

²⁸² “[D]espite the emphasis placed on market values, including competition, as the foundation of policy, the European Union (“EU”) views law predominantly as a profession....” Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT’L L. REV. 465, 469 (2008).

²⁸³ One American lawyer remarked “I’m a lawyer first and a businessman second. But, sometimes I put on my business hat first....” Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 750 (1998). However, it is interesting that interviewed attorneys expressed both disappointment at the fact law was increasingly looked at as a business as well as a belief that, “unless it is run like [one], it will disappear.” *Id.* at 758.

²⁸⁴ See, e.g., Vagts, *supra* note 211 at 679 (in which the author found all developed countries examined had legal systems with elements of both business and profession).

²⁸⁵ The law in general is thought of as a profession according to factors set forth by Harvard Business School. See Rakesh Khurana et al., *Is Business Management a Profession?* (Feb. 21, 2005), <http://hbswk.hbs.edu/item/4650.html>. These factors include:

a common body of knowledge resting on a well-developed, widely accepted theoretical base; a system for certifying that individuals possess such knowledge before being licensed or otherwise allowed to practice; a commitment to use specialized knowledge for the public good, and a renunciation of the goal of profit maximization, in return for professional autonomy and monopoly power; [and] a code of ethics, with provisions for monitoring individual compliance with the code and a system of sanctions for enforcing it.

Id. Another article characterizes a profession as an occupation which requires university-level training, Alan A. Klass, *What is a Profession*, 85 CAN. MED. ASS’N J. 698, 698 (1961), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1848216/pdf/canmedaj00909-0027.pdf>, has obtained legal status (“A profession must acquire a statutory basis in the law of the country”), is self-regulated, *id.* at 699, and has a “professional spirit” among its members, *id.* at 700. Despite these conceptualizations, it is important to examine the

To begin with, both the CCBE and Russian regulations do not apply to in-house attorneys,²⁸⁶ while the Model Rules certainly govern all lawyers, including in-house counsel.²⁸⁷ Because in-house counsel works in a corporate or business setting, excluding him from ethical regulations shows that the CCBE and Russian regulations approach lawyering as a profession and choose to take the business context out of its regulations, while the ABA Model Rules certainly include the business aspect into lawyering,²⁸⁸ which makes it consistent with the rules allowing American lawyers to work in corporate and other business settings.²⁸⁹ In contrast, Russia's regulations are especially strict on this issue, prohibiting its lawyers from any business-related employment other than "academic, teaching or other creative activities"²⁹⁰ and thereby showing even a stronger effort to separate lawyering from business than the CCBE Code.²⁹¹

ethical guidelines and their application in the United States, CCBE Member States, and Russia respectively to get a clearer understanding of how the end results of these analyses may not be entirely on point for each legal system.

²⁸⁶ On Work, *supra* note 4, art. 1(3) ("Work as an attorney does not include legal aid rendered by...participants in and employees of organizations..."). "Corporate in-house attorneys are not covered by the CCBE Code: they are not 'lawyers' for the purpose of Rule 1.4." Anastasia M. Pryanikova, Comment, Successive Representation in Cross-Border Practice: Global Ethics or Common Rules?, 10 TRANSNAT'L. L. & CONTEMP. PROB. 325, 338 n. 70 (2000) (citation omitted); see also Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 1117, n. 225 (2001) (explaining that in-house counsel is not covered by the CCBE Code based on the language of the CCBE Explanatory Memorandum and Commentary). As such, the European Court of Justice has held in-house counsel may not invoke attorney-client privilege. Daly, *supra* note 188, at 1279 (citation omitted).

²⁸⁷ See MODEL RULES OF PROF'L CONDUCT (2010) (stating that its provisions apply to "lawyers" without noting any excepted categories).

²⁸⁸ There has also been recent discussion surrounding pressures to change the ABA Model Rules to allow multidisciplinary practices (MDPs), which would further infuse business aspects into lawyering. See Hatten-Boyd, *supra* note 279, at 489. In MDP set-ups, attorneys partner with other professionals such as engineers, financial planners, and accountants to provide "one-stop shopping" to clients. *Id.* (citation omitted). The ABA has "demonstrated its willingness to address change" with other issues in the past, and it took its first step towards addressing this question by appointing a Commission on Multidisciplinary Practice in 1999. *Id.* However, it is important to keep in mind the negative commentary regarding MDPs and their effects on legal practice as well. One researcher warned that strong law firms could become "targets" for larger "predators," such as major accounting firms. R.G. Lee, *From Profession to Business: The Rise and Rise of the City Law Firm*, J.L. & SOC'Y 31, 40 (1992). It will be interesting to watch the ABA's treatment of MDPs in the future as globalization and competitive pressures continue to increase.

²⁸⁹ See *infra* p.37 and note 197.

²⁹⁰ KPEA art. 2(1).

²⁹¹ The CCBE Code simply states that "a lawyer may be prohibited from undertaking certain occupations." CCBE CODE, *supra* note 6, R. 2.5.1. The CCBE Code itself does not restrict lawyers from obtaining other gainful employment but rather says a lawyer who "wishes to participate directly in commercial or other activities not connected with the practice of law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State." *Id.* R. 2.5.3.

The next issue to consider here is the way these regulations treat advertising.

One set of rules that reflects the professional, as opposed to commercial, tension most strikingly is the body of restrictions on advertising. A traditionalist would say that advertising *per se* hurts the bar. It lowers the esteem in which people hold lawyers; it produces an undesirable kind of competition among lawyers and imposes additional costs on lawyers that they will pass on to their clients. From a law and economics perspective one sees advertising in this market as in others as producing a better-informed body of consumers – clients who can more easily find their way to the lawyer who can fill their needs most efficiently and economically. Of course, ideas originating entirely outside the body of rules governing lawyers have a powerful impact; once one accepts the idea that commercial speech is entitled to be protected in much the same way as other types of speech one is pushed in the direction of striking down limitations on lawyer advertising.²⁹²

In the past, attorney advertising was mainly viewed as inappropriate around the world.²⁹³

However, that has changed²⁹⁴ and, as discussed, Russia’s advertising regulations today are much stricter and more specific than the Model Rules²⁹⁵ and even the CCBE, again indicating that Russia definitely views lawyering as a profession rather than a business venture.

Another point of comparison involves attorney’s fees and freedom in fee negotiation under the business approach and a fee restriction or structure that is permissible under the profession approach. To that end, Russia and the CCBE Code are more restrictive regarding their fees as they prohibit contingency fees.²⁹⁶ In addition, the CCBE Code’s permitted bar-approved schedules²⁹⁷ also provide another example of fee regulation, which is distinguishable from the ABA Model Rules’ general guidelines on fees that indicate freedom of contract between the attorney and his client.²⁹⁸ Thus, both the Russian regulations and the CCBE Code

²⁹² Vagts, *supra* note 211, at 680.

²⁹³ “As of 1950, the concept that lawyers should not advertise was adhered to around the world.” *Id.*

²⁹⁴ For a discussion of attorney advertising history and its changes, please see *id.* at 680-82.

²⁹⁵ See *supra* Part V.B.b.4.

²⁹⁶ KPEA art. 16(3) (except in property disputes); CCBE CODE, *supra* note 6, R. 3.3. These provisions can be compared to MODEL RULES OF PROF’L CONDUCT R. 1.5 (2009) which allows contingency fees in all cases except for criminal and domestic relations. See *also* discussion of contingency fees *supra* Part V.B.A.3.

²⁹⁷ CCBE CODE, *supra* note 6, R. 3.3.3.

²⁹⁸ See MODEL RULES OF PROF’L CONDUCT R. 1.5 (2009).

once again show a much stronger tendency towards perceiving lawyering as a profession, rather than business as is more the case in the United States. Along these same lines, Russia and the CCBE Member States set forth strict regulations on how lawyers may practice, which may include the size and forms of professional organizations which are permitted.²⁹⁹ This goes against the notion of freedom to organize under the business model that is in existence in the United States, which sets no restrictions on lawyers' organization and type of practice other than prohibition of partnership with non-lawyers.³⁰⁰

This brief comparison and accompanying discussion very much confirm that Russia views lawyering as a profession rather than business, which is similar to the CCBE Code and distinguishable from the ABA Model Rules. This further shows that influence of the civil law system on Russia's legal profession remains significant and it managed to stay in force despite the drastically different experience the country underwent during communism. It further sheds light on the new regulations restricting advocates in Russia from participation in any type of business and the regulations' overall lack of focus on a client's wishes in his relationship with an attorney, which is vastly different from the approach to lawyering taken by the United States.³⁰¹

²⁹⁹ See On Work, *supra* note , art. 20(1) (setting forth the three permissible ways to practice in Russia); see also discussion *supra* Part V.B.a.2 (discussing firm size limits in CCBE Member States). "The rules governing a profession are shaped by the size of the bar as a whole and by the size of the organizations that lawyers inhabit within it. The number of lawyers in different countries varies tremendously, as we learned when the controversy about "excess" lawyers in the United States was launched by Vice President Dan Quayle." Vagts, *supra* note 211, at 688 (citation omitted).

³⁰⁰ MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2009).

³⁰¹ The business-like approach taken in the United States can also be seen in the way legal services are treated similar to a commodity on the open market. Over the last decade or so trade in legal services has been steadily increasing. See Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463, 494 (2005). In 2003, the United States exported \$3.376 billion in legal services. *Id.* Moreover, many firms are becoming global to increase their presence in the market. See *id.* By 2004, all of the top ten largest firms worldwide had office branches in at least ten different countries. *Id.* One scholar has humorously but truthfully commented that

Competitive pressures inspire fear – even terror....Law firms sometimes appear to be seized by the adolescent angst that all your friends are at a party to which you haven't been invited – it is unbearable not to be there, even if you know you would have a terrible time. For many American firms, the foreign office is a loss leader, an outpost to entertain visiting firemen, a way of showing the flag, an address to add to the letterhead and a discreet form of advertising.

d. Where do the Russian Regulations Stand?

In summary, it is apparent that the new attorney regulations in Russia represent a combination of the elements of the civil law legal system with the country's historic roots, cultural and societal values, and its recent thrive for a change in the image, role and substance of the legal profession. This outcome certainly makes sense as Russian law has been mainly based on codes and statutes with its rulers historically influenced by German and French law. Also consistent with the civil law approach, Russia's vision of an advocate involves a balance of his responsibilities to clients, the court and the profession, rather than putting the client at the center of the attorney-client relationship, as is the case in the United States. Olga Pina argues that distrust for lawyers is embedded in civil codes.³⁰² Obviously, the new attorney regulations in Russia more than reflect this trend, which is exaggerated based on the history of the legal profession during the communist era that was discussed earlier in this article.

Having examined and discussed the new attorney regulations in Russia, it becomes clear that, to its credit, the country was able to compose reasonable western-type law in a relatively short period of time. In fact, merely adopting these new attorney regulations represents a huge step towards the establishment of a new type of legal profession in Russia: one that is independent and self-regulated. To that end, it does not seem worthwhile to engage in overanalyzing and arguing over the wording or various readings of the Code or the "On Work." Most importantly, the regulations present a solid framework for the ethical practice of law in Russia, especially in light of the fact that they are in their initial versions and can possibly be

George C. Nnona, *Multidisciplinary Practice in the International Context: Realigning the Perspective on the European Union's Regulatory Regime*, 37 CORNELL INT'L L.J. 115, 123 (2004) (quoting Richard L. Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 738 (1994)).

³⁰² Pina, *supra* note 172, at 810.

further amended or adjusted in the future. However, three major questions arise pertaining to this discussion. First, based on the historic distrust the Russian people have towards the rule of law, will these new regulations be consistently enforced? Second, what will happen to the jurists--unregulated lawyers, which represent a majority of lawyers in Russia today? Third, does what appears to be a tremendous step towards creating the ethical practice of law represent a true perestroika in Russia's perception of the legal profession and its role in society or are these regulations merely perfunctory guidelines that came about together with many other laws that were mechanically put on the books during the years in transition between political regimes and are not to be taken seriously?

VI. ENFORCEMENT ISSUES—RULE OF LAW IN RUSSIA

In order to arrive at one's best answer to the first issue of whether the new regulations will be enforced, it is important to discuss why the Russian people disobey and disrespect the law in the first place.³⁰³ "[T]he rule of law requires some level of shared expectations by political elites, lawyers, and laypersons about what counts as law, about what are the limits of judicial power, and about into what spheres of life the law may not be permitted to intrude."³⁰⁴ Three main principles have been identified as essential to establishing the meaning of the rule of law. First, the "rule of law or supremacy of law over government, means that there can be no offense – criminal, civil, political or administrative – without law."³⁰⁵ The second principle requires that the first one be applied on a universal basis: all laws must have an equal application

³⁰³ See Lewinbuk, *supra* note 8, at 848.

³⁰⁴ Kahn, *supra* note 38, at 360.

³⁰⁵ *Id.* at 364.

to all citizens.³⁰⁶ The third one requires the “existence of an independent and politically neutral judiciary that is broadly accessible to aggrieved individuals.”³⁰⁷ Each of these principles is of equal importance in terms of its contribution to the overall realization and success of the “rule of law.”

Most scholars agree that Russia still fails to implement the “rule of law” the way it is defined in the West, and many believe that the Russian government’s commitment to law is not credible overall.³⁰⁸ According to Professor Kathryn Hendley, institutional as well as societal changes are needed for the “rule of law” to prevail, and she believes that Russian society is not currently willing to “take responsibility for ensuring the state lives up to its promises.”³⁰⁹ However, Professor Jeffrey Kahn argues against the most common approach taken by political scientists and states that the rule of law in Russia should not be perceived and analyzed as a tool that would advance democratic ends. Instead, he believes it should be viewed as more of a “causeway” for Russia’s political development.³¹⁰

Despite all efforts to develop and regulate the legal profession, a relatively recent survey demonstrates that “[a]n overwhelming majority of Russians do not think that they live under a rule-of-law state.”³¹¹ Moreover, periodic surveys conducted by the Levada Center in Russia over the last ten years reveal that less than twenty percent of survey participants have confidence in Russian courts, and very few participants view Russia’s law as a shield against wrongdoing.³¹² It

³⁰⁶ *Id.* at 365.

³⁰⁷ *Id.* at 366.

³⁰⁸ Hendley, *supra* note 47, at 241-43.

³⁰⁹ *Id.* at 262.

³¹⁰ Kahn, *supra* note 38, at 370. “The value of this causeway lies first in the free movement of citizens that it facilitates among state and non-state institutions in daily life, commerce and politics.” *Id.*

³¹¹ *Id.* at 407 n.180 (quoting Richard Rose et al., *Resigned Acceptance of an Incomplete Democracy: Russia’s Political Equilibrium*, 20 POST-SOVIET AFF. 195 (2004)).

³¹² Hendley, *supra* note 47, at 243. In another national survey, thirteen percent of respondents believed the courts to be truly independent of political influence, and forty-two percent saw the courts as being somewhat dependent on the political leadership. *Id.* A 2007 survey revealed that fifty-one percent of Russians believed the courts were the

is also interesting to note that, overall, Russian citizens prefer to avoid using the courts.³¹³ In response to why that is the case, those surveyed explained that it is hard for them to find a competent attorney due to rumors of corruption in the education system and lack of a meaningful accreditation system.³¹⁴ They further blamed it on a culturally-driven dislike for conflict, especially among women, as well as their fear of dishonest judges who can be bought off.³¹⁵ Also, besides the general perception that telephone law is the main reason people do not rely on courts, the interviewees stated that other common concerns include the time, expense and emotional energy involved in a lawsuit.³¹⁶ Overall, Professor Hendley argues that poll results tend to be “more consistent with the common wisdom that the Russian courts are dysfunctional than with the reality of increased use of courts.”³¹⁷ Most of her interviewees still viewed the law as an instrument used by the state at its discretion and blamed the legislature and others while not actually putting any responsibility on the President himself.³¹⁸ The survey participants, however,

proper remedy if their rights were violated versus forty-two percent in 2003. *Id.* at 244. However, given that only a small portion of respondents (ten percent) had initiated a lawsuit, this suggests that these poll results are not indicative of actual increased court use. *Id.* Overall, it is safe to say in the past “the Russian judiciary has not functioned as an independent branch of government to which its citizens may come for access to justice or protection from government excess or unfairness,” and this has created long-lasting challenges to increasing court use and democratizing Russia in general. John. D. Shullenberger, *The Russian Federation and Karelia: Rapid Change and the Rule of Law*, 21 VER. B.J. & L. DIG. 20 (1995).

³¹³ Hendley, *supra* note 47, at 243. *But see* Peter H. Solomon, Jr., *Assessing the Courts in Russia: Parameters of Progress under Putin*, 16 DEMOKRATIZACIYA 63 (2008), available at 2008 WLNR 4772643 (discussing overall increased use of Russian courts from 1990 – 2006).

³¹⁴ Hendley, *supra* note 47, at 251 (citation omitted). In 2006, seventy-six percent of those surveyed by the Foundation for Public Opinion stated that it was easy to buy a diploma, and seventy-eight percent believed attorneys with purchased diplomas did not have adequate professional skills. *Id.* n.25.

³¹⁵ *Id.* at 249-51. For a discussion of judicial selection and recent reforms attempting to increase judicial independence under President Putin, see Alexei Trochev, *Judicial Selection in Russia: Towards Accountability and Centralization*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 375 (Kate Malleson & Peter H. Russell eds., 2006).

³¹⁶ Hendley, *supra* note 47, at 249. *But see* Solomon, 2008 WLNR 4772643, at 69 (arguing for the efficiency of the Russian court system regarding the time frame for civil cases).

³¹⁷ Hendley, *supra* note 47, at 244.

³¹⁸ *Id.* at 247.

failed to place any blame upon themselves, which, according to Professor Hendley, adds to the explanation of “why societal demand for rule of law was slow to materialize.”³¹⁹

It is thus understandable that society’s lack of faith in the law will not change overnight and will continue to take time to overcome. Obviously, it is impossible to predict how slowly it will change, although, based on just the enactment of the new attorney regulations and other indicators pertaining to the changes in Russia’s political and economical situation,³²⁰ it appears safe to conclude that the public’s attitude towards the rule of law will continue changing for the better. According to President Dmitry Medvedev, who “laid out a bold democratic vision” of Russia in the future, the country’s “political system will be extremely open, flexible and inherently complex.”³²¹

That brings this article back to the question of whether the new attorney regulations will be enforced and, if so, how rigorous that enforcement will be. Although the regulations are still new and it is hard to know for sure, substantial steps have been made to demonstrate the seriousness of enforcement. Since the regulations’ enactment, a number of ethical violations have been already addressed resulting in sanctions to attorneys. For example, an attorney was found in violation of Article 12 of the Code³²² when he submitted seventy identical declarations to the court petitioning for the disqualification of the judge with jurisdiction over one of his

³¹⁹ *Id.* at 248.

³²⁰ For example, the fall in the Russian economy in 2009 caused many international firms to cut back their services in the country. The Legal 500 2010: Europe, Middle East & Africa, <http://www.legal500.com/c/russia> (last visited July 6, 2010). In turn, domestic Russian firms “have been able to capitalize on the downturn.” *Id.* Not only are they becoming involved in more transactions, but, because many law graduates are now hesitant to join international practices, the Russian firms are also “cherry picking from the surplus of available and more affordable lawyers.” *Id.* This increase reliance on domestic firms can potentially emphasize the importance of the rule of law, and the improved selection of attorneys may be helpful in promoting change from within the profession.

³²¹ Simon Shuster, *Medvedev Dashes Hopes for More Democracy in Russia*, TIME, Oct. 30, 2009, <http://www.time.com/time/world/article/0,8599,1933251,00.html>.

³²² “[A]n attorney must show respect for the court....In raising objections to the actions of judges...the attorney must do so in the correct form in accordance with the law.” KPEA art. 12.

cases.³²³ The attorney was issued a warning for his conduct.³²⁴ In another recent case, an attorney had his status terminated, i.e. disbarred, after having violated Article 16 of the Code,³²⁵ among other provisions.³²⁶ These examples, together with a number of other disciplinary proceedings, will likely send the message to advocates, and even possibly to jurists, that unethical conduct among members of the legal profession is no longer acceptable in Russia.

VII. PERESTROIKA OR JUST PERFUNCTORY?: WHERE IS THE RUSSIAN LEGAL PROFESSION HEADING?

It is captivating to see how the fall of communism led to a speedy westernization of Russia, with its new regulations for advocates promoting their independence of judgment rather than allowing attorneys to be used as tools of the state and promotion for the totalitarian system.³²⁷ Similar to the United States and most European countries, Russia now has its own code of professional ethics that regulates its advocates--many fail to realize what a major accomplishment that is. Focusing on finding deficiencies in Russia's new laws, cynics and critics forget that a post-communist country that has just managed to carve out its first formal regulations of professional ethics cannot be compared to that of the United States, which has an old and prominent legal profession performing in a world of democracy.³²⁸ It is critical to

³²³ *Council of the Chamber of Attorneys of the City of Moscow Record of Disciplinary Proceedings Against Attorney I. [Spring 2008], translated in STATUTES & DECISIONS Sept.-Oct. 2008, supra note 155, at 51, 67.*

³²⁴ *Id.*

³²⁵ "An attorney must refrain from including in an agreement conditions that make payment of remuneration dependent on the outcome of the case." KPEA art. 16(3).

³²⁶ *Council of the Chamber of Attorneys of the City of Moscow Disciplinary Proceedings Against Attorney B. [Spring 2008], translated in STATUTES & DECISIONS Sept.-Oct. 2008, supra note 155, at 37, 50.*

³²⁷ "[A] great deal of significant legislation has been introduced," and Russia is currently dealing with many of the same legal issues that the United States faced about eighty years ago. Interview by the Russian Investment Review with Dimitry Afanasiev, Managing Partner, Egorov, Puginsky, Afanasiev & Partners, LLP (April 21, 2007). "[T]he recent phenomenon is the emergence of Russian law firms with a thorough understanding of Western professional and ethical standards of practice, who can, at the same time, effectively deal with the local conditions by being local players." *Id.* An argument can also be made that a part of "westernization" of Russia encounters its return to some of its pre-revolutionary roots.

³²⁸ To put things into perspective

remember that the new legal profession is being born in Russia as we speak, with its initial regulations enacted less than ten years ago.

However, as discussed earlier in this article, enforcement of any law in Russia is not automatic.³²⁹ Moreover, a number of Russian lawyers continue to face threats and dangers based on the type of work they do and positions they take in support of their clients.³³⁰ According to one expert, a “lawyer can keep a low profile and work on cases that never bring him close to peril, but the problem in Russia is, danger can lie in unexpected places.”³³¹ Despite the potential danger, a serious attempt to regulate the profession and enforce the law is being made from

America had been an independent legal system for 120 years before its bar found it necessary to adopt the first rules – and those rules were merely called canons of ethics. Those rules, like those currently in force in other countries, were brief and very general in tone, trying to set standards rather than lay down specific rules (citation omitted). Since that time they have evolved in the direction of greater and greater detail and specificity. In many cases involving trans-border questions, the American rules that govern will address the issue much more specifically than the counterpart rules in other countries.

Vagts, *supra* note 211, at 689.

³²⁹ See discussion *supra* Part VI.

³³⁰ “For lawyers in Russia these days, life is difficult, even dangerous. Even attorneys who handle run-of-the-mill corporate work – including real estate deals, corporate contracts, environmental regulations and tax matters – have reported threats and harassment, according to the Moscow-based think tank Memorial Human Rights Center.” Lynda Edwards, *Russia Claws at the Rule of Law*, A.B.A. J., July 2009, available at http://www.abajournal.com/magazine/article/russia_claws_at_the_rule_of_law. Tactics used against attorneys “[range] from prison to deportation.” Alastair Gee, *Russian Lawyers Claim Kremlin Abuses*, (July 28, 2008), <http://politics.usnews.com/news/world/articles/2008/07/28/russian-lawyers-claim-kremlin-abuses.html?PageNr=2>. The case involving Yukos Oil is a fairly recent example of the danger attorneys working in Russia may face. The Russian company’s CEO (Mikhail Khodorkovsky) was convicted of fraud and later faced charges of money laundering and embezzlement. Edwards, *supra*. Those attorneys who were part of Khodorkovsky’s defense team suffered serious consequences for their involvement. *Id.* American attorney John Pappalardo refused to take cabs in Moscow out of fear he would be kidnapped and he received a death threat via telephone as well. *Id.* The executive vice president of Yukos and former head of its legal department was arrested and not given proper medical attention in jail despite the fact he suffered from AIDS, cancer, and tuberculosis. *Id.* Even more extreme is Stanislav Markelov’s story. Markelov represented the family of an eighteen year old woman who was kidnapped and raped. *Id.* A Russian colonel was convicted for her murder and sentenced to ten years. *Id.* The colonel was released early, and Markelov held a press conference in opposition. *Id.* Immediately following the press conference, Markelov was murdered. *Id.* There is uncertainty as to exactly what led to Markelov’s murder due to the fact he was working on several other cases involving alleged torture by politicians and officers. *Id.* Sadly, this was not the only time Markelov encountered physical harm – he was previously attacked by skinheads in a subway while working on a case against a Russian police officer. *Id.*

³³¹ Edwards, *supra* note 331. Because the “legal boundaries [are] so uncertain...even mundane transactions can involve personal risk to the lawyers involved.” *Id.*

above.³³² To that end, President Medvedev specifically stated: “we must reach a level of stability, in order that nobody is scared of the future. Only then can we motivate people to consider it illegal to not pay taxes or take bribes.”³³³ The decisions enforcing the new attorney regulations that have already been published certainly show that enforcement mechanisms for these new regulations exist and are being used to ensure compliance with the new ethical standards.³³⁴ These decisions also demonstrate the seriousness of these ethical rules and their application to members of the “advokatura”/advocacy. This point, however, brings us back to the dilemma addressed earlier in this article – no matter how vigorous these regulations and their enforcement may be, they are only applicable to a small fraction of the profession. What about jurists--all the other lawyers who remain unregulated? Will there ever be mandatory ethical standards to regulate them?

Like other dilemmas and predictions, that question is hard to answer. The hope is that the advocates who are arguably already more popular, reliable and known to offer higher quality legal work, will eventually push out the jurists, forcing all lawyers to become members of the “advokatura”/advocacy. However, this prediction may be overly optimistic. Today, there are many more jurists than advocates, and most jurists will definitely not want to change their

³³² Efforts to improve the country’s legal system are being initiated from outside Russia’s borders as well. For example, the ABA Rule of Law Initiative (ABA ROLI) has focused its attention on several key issues. See American Bar Association, ABA Rule of Law Initiative Programs – Russia, http://www.abanet.org/rol/europe_and_eurasia/russia_programs.html (last visited July 2, 2010). In recent years, the ABA ROLI has created tailored training programs to fight corruption at the municipal level. *Id.* It is also providing training seminars to criminal defense attorneys with the hopes of improving the quality of representation for clients. *Id.* The ABA ROLI is also working with several offices in Moscow to address the human trafficking problem via training for consular offices as well as offering a specialized curriculum for law students interested in the issue. *Id.* Other areas of focus include legal profession reform, judicial reform, civic education and legal education reform, and women’s rights. *Id.*

³³³ Dmitriev, *supra* note 217. Medvedev’s poll ratings “remained consistently high” throughout 2009, despite the problems brought on by the country’s economic downturn. Simon Tisdall, Medvedev Faces Russia’s New Reality (July 21, 2009), <http://www.guardian.co.uk/commentisfree/2009/jul/21/russia-medvedev>. This could be a promising sign that Russian citizens trust the President and are on board with his agenda which would make stability and compliance with the law a more likely reality for the country.

³³⁴ See discussion *supra* Part VI.

ways.³³⁵ As such, for this outcome to prevail, it may require that the next generation of lawyers have an independent willingness to join the “advokatura”/advocacy. However, it is also possible that the vigorous enforcement of ethics rules may discourage people from going into the “advokatura”/advocacy, which is already difficult to join. Some advocates may even choose to give up their licenses and practice as jurists, deciding to avoid being subject to regulation and offering a lower rate to their clients as they no longer have to prepare for examinations, pay dues or incur other costs associated with membership. The advocates and jurists in Russia are currently divided into two distinct camps that are engaged in power struggle. It is certainly unclear who will win, but it is unlikely the profession will remain divided for long. The advocates are also distinguishable from all other legal professionals, such as notaries, procurators and judges that do not share the same level of ethical regulation and accountability. As such, the “advokatura”/advocacy has a difficult battle to fight, and only time and new developments in Russia’s socio-economic and political life will determine whether it can win control of the legal profession in the future.

Finally, does this battle for regulation of the legal profession in combination with the creation of these new ethics laws establish a full perestroika or is it just perfunctory? The author believes it is both. On the one hand, the regulations had to be enacted as part of the westernization of the legal profession and something that had to be put on the books given Russian society’s attempt to westernize and transition into a democracy. On the other hand, the regulations are truly revolutionary considering the history of the legal profession in Russia. Despite this inspiring effort, however, a tremendous amount of work is left to be done to allow for an actual full transformation of Russia’s legal profession. In fact, President Medvedev, a lawyer

³³⁵ In fact, a previous attempt to regulate jurists had failed. For a discussion, see *infra* note 208.

himself, admitted that “[s]trong laws alone do not help.”³³⁶ Pointing out that the explanation for challenges in law enforcement lies in Russia’s historically “high level of legal nihilism,” Medvedev specifically cited the policies that the Russian government followed in the past and further added that “[i]t has not been understood how a government that acts illegally shows disdain for fundamental rules.”³³⁷

What starts as perfunctory can eventually lead to a serious perestroika, and that is exactly what has happened in Russia. The country’s political and socio-economic regime led to the changing role, westernization and increasing demand of lawyers and judges. That westernization eventually led to the need for regulation, and once the body of “advokatura”/advocacy became regulated and clearly stood apart from jurists, a substantial perestroika of the legal profession began. It is fascinating to watch these developments, and the author remains hopeful that the advocates will continue to operate the way they are envisioned to, thereby changing the role, image and responsibilities of a lawyer and ultimately arriving at perestroika – the true and actual restructuring of the legal profession in Russia.

³³⁶ Dmitriev, *supra* note 217.

³³⁷ *Id.*