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Ensuring Independence in the Regulation of Professional Advocates' Ethics in the Russian Federation and in the Republic of Poland

The bar is a barometer that determines the legal climate of any society.

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1. Introduction

The bar is essential for the appreciation and application of the rule of law in all societies all over the world. In order to carry out these critical tasks, lawyers must “at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession¹”. The constitutions and rules of criminal procedure of almost all European states contain provisions stating that the accused individuals have the right to receive qualified legal assistance. This right is an integral feature of every civil society and every democratic state. It protects the citizens against the willfulness of the law enforcement bodies.

It should be mentioned that many various ethical standards regulating the profession of an advocate (Polish: *adwokat*, Russian: *адвокат*; the term roughly corresponds to attorney in the US or barrister/solicitor in the UK) are codified in codes of conduct, regulations, guidelines, procedural rules, and legislation². An analysis of the ethical standards existing in various legal traditions can help to deduce several core principles that guide the legal profession worldwide. These include: independence, honesty, integrity, loyalty, confidentiality, fair treatment, diligence, candour, and competence³. While many core principles are shared across legal systems, their interpretation and understanding by lawyers is shaped and nuanced by the legal system in which the lawyer

¹ *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27.08.–07.09.1990, para. 14; available at: <https://www.un.org/ruleof-law/files/UNBasicPrinciplesontheRoleofLawyers.pdf>, accessed: 10.05.2018.

² M.G. Karnavas, *Lawyer's Ethics*, Skopje 2016, p. 7.

³ M.G. Karnavas, *Lawyer's...*, p. 7.

operates⁴. As Philip M. Genty noted: “Professional legal ethics is (...) subjective and contextual, because the legal profession and the practice of law are necessarily defined in large part by the specific culture of which they are a product”⁵.

At the same time, the history of the Polish Bar Association suggests that the formation and development of the Russian and the Polish bars have much in common. Russian professional advocacy is the youngest in Europe. It has emerged as a result of the judicial reform in 1864. By this time, in the rest of Europe the bar had already had a long history and strong traditions.

As noted by a famous Polish-Russian scientist Evgeniy Vaskovskiy (Eugeniusz Waśkowski):

a special influence on the development of the legal assistance in Russia was exerted by the organization of the Bar in the Kingdom of Poland, which had been constituted much earlier. In preparation for the judicial reform in 1864, the experience of the advocacy activities in the western territories, in particular the Kingdom of Poland and the Grand Duchy of Lithuania, was largely used⁶.

The Polish Constitution of 1791 served as the model for the creation of the Russian Bar. But even when countries have common history, there are inevitably some differences in their legislation. Sometimes what is ethical for a lawyer in one jurisdiction may be considered unethical or even illegal in another, as the following vignette, offered by Karen Miller, illustrates:

During a recent visit to the International Criminal Tribunal for the Former Yugoslavia, I met one of the staff lawyers who explained that in discussing preparation of the witnesses for cross-examination during trial several lawyers from different countries expressed opposing views on the questions of ethics involved. An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer's view was that not to prepare a witness would be malpractice⁷.

Thus, I believe that it is important to compare Russian and Polish legal systems and to explore their evolution.

2. Scientific understanding and legislative support for advocate's ethics in the Russian Federation and the Republic of Poland

In comparison with other legal professions, advocacy is surrounded by most interesting cultural aura⁸. Often a client tells his or her advocate more than the closest family or friends. The relationship between the advocate and the client is based on trust, privacy and even intimacy of the questions encountered in the course of an advocate's work⁹.

⁴ M.G. Karnavas, *Lawyer's...*, p. 7.

⁵ P.M. Genty, *The challenges of developing cross-cultural legal ethics education, professional development, and guidance for the legal professions*, “New York Law Journal” 2011/37, p. 14.

⁶ E. Васъковский, E. Тарло (E. Vaskovskiy/E. Waśkowski, E. Tarlo), *Традиции адвокатской этики* [Eng. *Traditions of legal ethics*], Sankt Petersburg 2004, p. 202.

⁷ K. Miller, *Zip to nil?: A comparison of American and English lawyers' standards of professional conduct*, Philadelphia 1995, p. 204, quoted in: M.C. Daly, *The dichotomy between standards and rules: A new way of understanding the differences in perceptions of lawyer codes of conduct by US and foreign lawyers*, “Vanderbilt Journal of International Law” 1999/32, p. 1154.

⁸ Cf. R. Tokarczyk, *Etyka prawnicza* [Eng. *Legal ethics*], Warszawa 2005, p. 148.

⁹ R. Sarkowicz, *Amerykańska etyka prawnicza* [Eng. *American legal ethics*], Warszawa 2004, p. 72.

But today, an advocate must not only engage in arguments with the law enforcement agencies in the name of his or her client, but also consider the pressure of public opinion and the claims of his or her own clients¹⁰. This is why an advocate is bound by the rules of professional ethics and cannot allow unacceptable behavior. That is also why many Russian and Polish academics have recognized the important role of the moral foundations of advocacy.

According to Vaskovskiy (Waškowski), “No other profession has involved so many moral temptations as advocacy. An advocate is an expert in jurisprudence and he can clothe in the legal form any trick”¹¹. To me, this statement seems true without any doubt. Perhaps it is difficult to imagine any legal profession with greater ethical “uncertainty”. On the one hand, an advocate is obliged to further his or her client’s interests, while on the other the provision of qualified legal assistance definitely has an apparent public interest, which the advocate should also take into account. Nikolay N. Polyanskiy, when considering questions of teleology of defence in the criminal procedure, wrote that if truth and justice are the goals of the process, the defence has to be true and ethical¹². The independence of the lawyer (its nature and limits) became a long-standing subject of academic reflection. Edmond Picard considered the independence of the lawyer as “his duty to himself”¹³.

Teresa Gardocka draws attention to the fact that procedural law establishes two types of requirements for advocacy in the criminal procedure: formal and material ones. Formal requirements oblige the defence counsel to have the status of an advocate and set the limit to the number of advocates of the suspect (the accused). Material requirements pertain to the restrictions on the counsel in the course of providing qualified legal assistance in the form of refraining from committing acts contrary to the law¹⁴. Such provisions require the advocate to comply with professional ethics. On the other hand, the applicable legislation contains requirements whereby the client’s interests are seen as the main priority of the activity of an advocate.

The activity of advocates in the Russian Federation today is regulated by the Federal Act of 31 May 2002 on the Advocate’s Activity and the Bar in the Russian Federation¹⁵. There is also a special act of 31 January 2003, which is dedicated to the problems of the advocate’s professional ethics, namely the Code of Professional Ethics for Advocates¹⁶. These laws provide lawyers with broad rights in the delivery of qualified legal assistance. In the Republic of Poland, qualified legal assistance is regulated by the Act of 26 May 1982 – the Law on the Advocates’ Profession¹⁷. On 10 October 1998, the Polish Bar

¹⁰ W. Bergier, J. Jacyna, *Etyka zawodu adwokata. Regulamin wykonywania zawodu adwokata. Komentarz praktyczny, orzecznictwo, wzory i kazusy* [Eng. *Ethics of the profession of an attorney. Regulations on the practice of attorneys. Practical commentary, verdicts, samples, case studies*], Warszawa 2005, p. 7.

¹¹ Е.В. Васьюковский (E. Vaskovskiy/E. Waškowski), *Основные вопросы адвокатской этики* [Eng. *Main issues of attorney’s ethics*], Sankt Petersburg 1895, p. 58.

¹² Н.Н. Полянский (N. Polyanskiy), *Правда и ложь в уголовной защите* [Eng. *Truth and lies in the criminal defense*], Voronezh 2003, p. 27.

¹³ E. Picard (Э. Пикар), *Об адвокате (парадокс)* [Eng. *About an attorney (paradox)*], Moscow 2000, p. 23. Original: E. Picard, *Paradoxe sur l’avocat*, Brussels 1880.

¹⁴ T. Gardocka, *Postępowanie karne. Podręcznik akademicki* [Eng. *Criminal procedure. Law book*], Warszawa 2015, p. 97.

¹⁵ Федеральный закон от 31.05.2002 N 63-ФЗ (ред. от 29.07.2017) «Об адвокатской деятельности и адвокатуре в Российской Федерации».

¹⁶ Кодекс Профессиональной Этики Адвоката.

¹⁷ Ustawa z 26.05.1982 r. – Prawo o adwokaturze (tekst jedn.: Dz. U. z 2018 r. poz. 1184).

introduced its Rules of Ethics for Advocates and the Dignity of the Profession known as the Code of Ethics for Advocates¹⁸.

According to Article 6 of Polish Rules of Ethics for Advocates and the Dignity of the Profession, the aim of an advocate's professional activity is to protect the interests of the client. Article 9 of the Federal Act on the Advocate's Activity and the Bar in the Russian Federation provides that an advocate must not take a position on the case which is opposite to the position of his or her client, and act against the client's will, except in cases when the defence counsel believes in his or her client's self-incrimination. Despite the high priority of the client's wishes, an advocate is obliged to act within the limits of the law.

3. Conflict between an advocate and his or her client

Often the client's wishes have a completely illegal character. A person who is held criminally liable seeks to avoid punishment by all means. So how should an advocate act if his or her interests and the interests of the client contradict one another? The answer to this question depends on whether an advocate is independent in the relationship with the client – or not.

Paweł Skuczyński rightly stresses that an advocate cannot be absolutely independent. First of all, this is because of the financial leverage of advocates¹⁹. In spite of that, Skuczyński believes that advocates are independent in their work and this basic principle plays a crucial role in this profession. According to Skuczyński, the independence of an advocate is expressed primarily in the freedom of choice of the clients, the non-binding character of clients' instructions, the lawyer-client privilege (enjoyed by every advocate), and the freedom to determine the payment for the advocate's work depending on the result of the case (*pactum de quota litis*)²⁰.

The current legislations of practically all European states recognise the principle of advocates' independence. Article 2 of the Federal Act on the Advocate's Activity and the Bar in the Russian Federation states that:

An advocate is a person who has obtained, in accordance with this federal act, the status of an advocate and the right to practice law. An advocate is an independent professional legal adviser. An advocate does not have the right to enter into an employment relationship as an employee, with the exception of scientific, teaching, and creative activities, or hold public office of the Russian Federation, the state posts of the Russian Federation, civil service positions, and municipal positions.

According to Article 3 of this Federal Act "The bar operates on the basis of the principles of legality, independence, self-government, corporate character, and the principle of equality of its members". Article 18 of the Act, which is dedicated to the guarantees of advocate's independence, provides:

1. Interference in an advocate's activity carried out in accordance with the law, or preventing such activity, in whatever way, is prohibited.
2. The advocate may not be held liable (including after suspension or termination of the status of a counsel) for an opinion expressed while working as a lawyer, unless a legally effective

¹⁸ *Zbiór Zasad Etyki Adwokackiej i Godności Zawodu (Kodeks Etyki Adwokackiej)*.

¹⁹ P. Skuczyński, *Etyka adwokatów i radców prawnych* [Eng. *Ethics of advocates and legal advisors*], Warszawa 2015, p. 44.

²⁰ P. Skuczyński, *Etyka...*, p. 45.

court decision established that the advocate was guilty of a criminal act (omission). These restrictions do not apply to civil liability of the advocate.

3. The solicitation from advocates and employees of lawyer formations, lawyer chambers and the Federal Chamber of Lawyers of the information connected with rendering legal assistance on specific cases is not allowed.
4. The advocate, members of his or her family and their property are protected by the state. The internal affairs bodies shall take necessary measures to ensure the safety of the advocate, members of his or her family and of their property.

According to Article 1(3) of the Polish Law on the Advocates' Profession, in the discharge of their professional duties advocates are accountable only to the law. **There is no recognition of independence as a fundamental principle of advocacy in the Polish legislation.** But if we analyse the statute, we will find that there are some norms which are dedicated to the creation of an independent profession of an advocate. For example, Article 7 of the law provides that an advocate, during and in connection with the discharge of professional duties, enjoys legal protection in the same manner as a judge or a prosecutor. What is more, according to Article 8 of the statute:

1. An advocate, whilst performing his professional duties, shall enjoy the right to express himself/herself freely both orally and in writing within the limits laid down by the Bar Council and the law.
2. Any abuse of this freedom which constitutes a private insult or slander of a party, his/her attorney or defence counsel, custodian, witness, expert or translator shall only be subject to disciplinary action.

We should also pay attention to another important distinction between Polish and Russian regulations concerning the activities of an advocate, which must be taken into account when we consider the regulation of professional ethics. According to Article 28 of the Polish Law on the Advocates' Profession:

1. An advocate may only refuse to provide legal assistance for important reasons of which he /she must notify the party concerned. Doubts as to whether to provide legal assistance or refuse to provide it shall be resolved by the District Bar Council, and in situations where time is of the essence, by the Dean.
2. In cases where legal assistance is granted by virtue of legal regulations *ex officio*, only the entity appointing the advocate to conduct the case may decide to relieve the advocate from the duty to provide legal assistance.

Russian legislation does not provide for such a mechanism. Therefore, if an advocate accepts a case, there is no legal way to refuse it. The only possibility for an advocate is to ask his or her client to change the defence counsel.

The legislation in both countries pays considerable attention to establishing real guarantees of independence of the advocate. On the other hand, it is quite obvious that an advocate should avoid the ambition for an absolute, arbitrary extension of this independence. This is noted not only by Polish or Russian researchers, but also by academics and practitioners from other countries. Gordon Turriff indicates that the recognition by the courts of the independent nature of the assistance provided by an advocate to his or her client must not contradict the goals of justice. Even taking the privilege of independence into account, the courts should be prepared to identify specific actions, such as withholding information, as actions beyond the scope of defence. In such cases, the courts should apply measures of legal liability. For example, advocates should not

conceal physical evidence of the crime. A lawyer who commits such acts risks being prosecuted for an obstruction of justice²¹. This position is confirmed by the practice of the Supreme Court of Canada. A typical example is the case of Paul Bernardo, who was accused of murder and rape. Ken Murray, who acted as the defence attorney for Bernardo, following the instructions of his client, found a recording from surveillance cameras that proved his client was guilty and hid the tapes from the investigation and trial. Murray was later charged with an obstruction of justice²². Therefore, as we can see, there are limits to independence and if an advocate crosses them, independence becomes an abuse of power.

The above leads to the following question: does the advocate have the ability to act contrary to the will of the client? If so, in which cases can he or she exercise this right? If not, will it be just an abuse of power? Let us consider an example: an advocate is aware of the presence of an alibi: at the time the crime was committed the client (a married man) was with his mistress. For obvious reasons, the client insists on keeping this information secret. How should the advocate behave in this situation?

As mentioned before, in the Republic of Poland an advocate can refuse to provide qualified legal assistance to the client in situations similar to the above, but in the Russian Federation there is no such mechanism (which caused real problems in many cases). Article 6 of Polish Rules of Ethics for Advocates and the Dignity of the Profession provides that the aim of the advocate's professional activity is to protect the interests of the client. If an advocate does not agree with the client's position, he or she can refuse to continue to defend the client.

In Russian jurisprudence, this situation is resolved in various ways. According to Article 6(4) of Federal Act on Advocate's Activity and the Bar in the Russian Federation, a lawyer shall not:

- 1) act against the client's legitimate interests, by providing the client with legal assistance guided by considerations of the advocate's own advantage, unethical interests, or while being under external influence or pressure;
- 2) take a position in the case which is contrary to the client's position and act against the client's will, except in cases when the defence counsel believes the client is falsely incriminating himself or herself.

In the example we consider, this is the case: the client incriminates himself. In Russia, in such a case **an advocate can lawfully act against the will of the client**. Yet, different Russian scholars present different opinions on this situation.

Ivan Foyntskiy concludes that the objectives of legal assistance have fundamental importance for an advocate. Even if the client finds submitting certain evidence before the court unacceptable, an advocate has an unchallenged right to present it, but only if the evidence is advantageous for the client. Even regarding intimate facts, the announcement of which could be humiliating for the client, Foyntskiy is sure that an advocate has the right to present them before the court against the will of his or her

²¹ G. Turriff, *Self-Governance as a necessary condition of constitutionally mandated lawyer independence in British Columbia*. A speech delivered at the Conference of Regulatory Offices, Perth, Australia, 17 September 2009; available at: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/turriff-speech.pdf>, p. 12, accessed: 10.05.2018.

²² A. Woolley, *Understanding Lawyers Ethics in Canada*, Toronto 2011, p. 151.

client²³. On the other hand, Polyanskiy points out that if an advocate disregards the will of the client and discloses some information, even information which might be useful or necessary, then an advocate is certainly abusing his or her authority²⁴. Also Oleg Baev believes that according to the applicable laws, the lawyer should not hold a position in the case against the will of the client; acting otherwise does not justify the trust placed in the lawyer²⁵.

Yuri Stetsovskiy thinks that while protecting a minor or a person incapable of self-defence and while participating in the case concerning a crime for which death penalty may be imposed, the lawyer has greater procedural autonomy. In the remaining situations, constituting the largest category of cases in which the lawyer renders qualified legal assistance, the defence counsel has limited procedural autonomy. Thus, it is unlikely that the counsel can make motions and submit complaints against the will of the accused²⁶.

It is important to determine the boundaries of independence of the lawyer and to understand its essence. However, it is not always necessary to put the principle of the lawyer's independence above his or her duty to follow the wishes of the person who requests qualified legal assistance. In my view, the legitimate interests of the client shall be of primary importance for a lawyer. In the event of such conflict, the lawyer must explain to the client the consequences of concealing certain circumstances from the court. If the client continues to insist on the chosen strategy, the defence counsel has no reason to act against the client's will. This view corresponds to the regulations of the Federal Act on the Advocate's Activity and the Bar in the Russian Federation, which stipulates that an advocate may not take a position contrary to the will of the client, unless he or she believes the client falsely incriminates himself or herself. Yet, without the possibility of refusing to defend the client, the advocate's will is limited as he or she has to help the client to incriminate himself or herself.

4. Conclusions

Currently there are some specific problems in the Russian Federation concerning advocates' independence. During his speech at the 6th All-Russian Congress of Advocates, the President of the Moscow Bar, Genri M. Reznik noted a positive trend of the reduction of the instances of interference in the legal profession, such as refusals to issue documents, prohibition of lawyer-client meetings, illegal search operations against lawyers, and arbitrary detention. However, according to Reznik, individual law enforcement officers still show unabated interest in the lawyer-client privilege and try to knock out the advocate from the process or force the advocate to give evidence, although in normal situations such violations must not be allowed²⁷. This statement is of course a troubling sign of the disturbing processes taking place in the present day and age. Out of 500 responding lawyers, 32% pointed out that they had had the experience of officials

²³ И.Я. Фойницкий (I.J. Foinitskiy), *Курс уголовного судопроизводства. 2 том* [Eng. *Course of criminal justice. Volume 2*], edited by А.В.Смирнова (A.B. Smirnova), Sankt Petersburg 1996, p. 70.

²⁴ Н.Н. Полянский (N. Polyanskiy), *Правда...*, p. 64.

²⁵ Н.Н. Полянский (N. Polyanskiy), *Правда...*, p. 64.

²⁶ Ю.И. Стецовский (Y. Stetsovskiy), *Принцип профессиональной тайны адвоката* [Eng. *The principle of professional confidentiality of a lawyer*], "Адвокат" ("Advocate") 2008/3, p. 3.

²⁷ Е.А. Баскакова (E.A. Baskakova), *С трибуны съезда* [Eng. *From the congress floor*], "Российский адвокат" ("Russian Advocate") 2013/3, p. 5.

conducting the criminal proceedings, as well as representatives of other state bodies, including the staff of the Inspectorate of Taxes and Levies of the Russian Federation, sending them requests for disclosure of the facts covered by the privilege²⁸.

Thus, one of the most urgent problems is the independence of an advocate in relations with the government. It is important to guarantee absence of the pressure of law enforcement agencies on the advocate. The most important thing, though, is to guarantee the independence of the advocate in the relationships with the client. This is why it is so crucial to give the advocate the right to refuse to defend someone in exceptional instances and with the consent of the bar.

²⁸ А.В. Рагулин (A.V. Ragulin), *О праве адвоката-защитника отказываться предоставления сведений связанных с оказанием юридической помощи* [Eng. *On the right of defense attorneys to refuse to provide information related to the execution of legal assistance*], "Адвокатская практика" ("Advocate Practice") 2012/2, p. 16.

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Abstract: Unfortunately, today there is little Russian (and Polish) research dedicated to the analysis of the professional legal ethics in the Russian Federation and in the Republic of Poland. Nevertheless, this area of scientific research could be very useful for both countries because of the common history of these states. The article examines the existing research on the advocate's independence in Russia and Poland, while providing an attempt to compare the methods of legal regulation of qualified legal assistance introduced at the present stage.

Keywords: comparative law, the bar, qualified legal assistance, legal guarantees of advocates' activity, legal ethics, independence of advocates' activity

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