



# Strategies and Tactics of Criminal Defenders in Russia in the Context of Accusatorial Bias

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## Strategies and Tactics of Criminal Defenders in Russia in the Context of Accusatorial Bias

*The authors present a sociological description of the work of the defense attorney in a criminal case on the basis of theories of practical action (M. de Certeau, J.C. Scott) that focus on the tactics of the “weak” party in social interaction and on mētis as a special kind of practical knowledge. The power asymmetry in Russian criminal proceedings in favor of the prosecution places the defense attorney in a weak position in terms of resources. Three levels of this asymmetry are examined: (1) the day-to-day micro experience of criminal investigation; (2) the inequality of the parties as embodied in law; (3) informal practices of investigators, prosecutors, and judges that violate the rights of the defense. As a result, the scope for strategic action by the defense attorney is constrained by his relations with the defendant and/or client while with other participants in the case he acts tactically. On the basis of expert interviews with defense*

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*attorneys the authors delineate types of strategic and tactical action in their work on a criminal case.*

**Keywords:** *defense attorneys, legal profession, accusatorial bias, sociology of law, sociology of professions, strategy and tactics, theory of practices*

Criminal court proceedings in Russia presuppose a monopoly for advocates (members of the regional defense Bars): in order to represent the interests of defendants and victims a jurist usually must have the membership in the advocates' community. It is in turn defined by law (Federal Law No. 63, 2002) as an institution of civil society that is independent of the state authorities and has a self-managed and self-coordinated structure. This distinguishes advocates who act as defense attorneys from all other institutional participants in criminal investigation—judges, procurators, investigators, and law enforcement officials—who represent state institutions of penitentiary control. A widespread view among the latter is that the bar is a weak institution and attorneys have weak professional skills. Many judges, procurators, and investigators assume that the high success rate of the prosecution party and the rarity of acquittals (0.7 percent of all verdicts and 0.2 percent of verdicts in cases in which a procurator takes part) in Russian criminal court proceedings (Volkov et al. 2014, pp. 38–40) are attributable to a weak defense incapable of challenging weighty arguments and evidence. Defense attorneys retort that they are “weak” because they face institutional constraints in their work on a criminal case. The asymmetry of criminal proceedings (both at the pretrial stage and during the trial) greatly narrows the scope of the defense attorney as a participant in the investigation.

In this article we present a sociological description of the work of the defense attorney in a criminal case on the basis of the theories of practical action of Michel de Certeau and James C. Scott. Focusing on asymmetric power relations, these authors showed that subordinate groups retain a substantial arsenal of means to resist the efforts of the power-holding actors who subordinate them. The authors attach special significance to the fact that the “weak side” achieves its goals on the level of

practical action. We will show that the institutionally “weak” position of the defense attorney entails the priority of tactical over strategic actions (de Certeau). On the basis of expert interviews with practicing defense attorneys we will classify the main tactics used by them in Russian courts to protect the interests of the defendant and also describe the sole sphere in which the defense attorney does act strategically—the sphere of relations with his client.

### **“Zealous Advocates” or “System-oriented Players”: Two Models of Empirical Description of the Real Role of the Defense Attorney in Court**

The scholarly literature, which in most instances relies on American empirical data, usually makes use of two explanatory models of the professional role of the defense attorney. The first describes the normative ideal of the defender who zealously and assiduously represents the interests of his client, sometimes conducting an independent investigation and gathering evidence in favor of the person he is defending.\*<sup>1</sup> This ideal is embodied in legislation and in codes of ethics; it is upheld in courses on “professional ethics” taught at faculties of law. Empirical research within the framework of this approach focuses on two main themes. First and foremost, researchers are interested in finding out how ethical norms are applied in practice. For example, it is worth mentioning the vigorous debates about whether a defense attorney should always actively and aggressively represent the interests of his client in court or whether—and if so then when and under what specific institutional conditions—he should take into account the strength of the prosecution’s evidence, the caseload of the judge, and the latter’s desire to save time and finish an

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\*The client may be either the person whom the attorney is defending or another person, usually a relative, who is paying the attorney to defend that person. Unless otherwise specified, “client” should be understood as meaning the person whom the attorney is defending.—Trans.

open-and-shut case as soon as possible by omitting superfluous pleadings (Brown 1998; Luban 1993).

The second theme of empirical research is how and under what conditions the normatively given role of the defense attorney undergoes transformation and redefinition. Thus, for instance, it has been shown that in reality there is no single standard for a conscientious and assiduous defense or for the general professionalism of an attorney. Such a standard is in fact merely an object of professional discussion and subjective interpretation. The main mechanism for the formation and development of standards for the work of an attorney is collegial oversight by other members of the professional community. As a study of communities of attorneys specializing in divorce proceedings has shown, it is not so much vertical oversight from above as horizontal oversight (in the course of day-to-day interactions with colleagues) that shapes the conceptions of professionalism shared by attorneys. Professional communication within the framework of such communities creates the basis of identity, teaches basic work rules, and conveys an idea of what constitutes improper professional conduct, the sanctions that it entails, and also ways to avoid formal punishment (Mather, McEwen, and Maiman 2001, pp. 179–82). Thus the normatively embodied model of the independent “zealous” or “assiduous” defense attorney who conscientiously performs his obligations to his client is used in empirical research to describe ethical aspects of the profession and analyze the formation of generally shared professional standards for the work of an attorney.

A second model, based on empirical research on the real role played by defenders, above all in criminal court proceedings, offers an interpretation radically opposed to the normative model. It views the defense attorney as a player subordinated to the expectations of the judicial system. As early as 1967, Abraham Blumberg proposed to describe the defense attorney in a criminal case as a double agent who coordinates the positions of his client with the interests of the prosecution, judges, and court officials. The main task of the defense attorney in the role of a double agent is to rely on the defendant’s trust to persuade him to plead guilty,

thereby lightening the work of the prosecution and reducing the costs of the administration of justice (in terms of time, money, etc.) (Blumberg 1967). Other researchers supported this view on the basis of their own observations of court proceedings. In 1977, for example, James Eisenstein and Herbert Jacob used the conception of a “courtroom workgroup” to portray the activity of all trial participants—prosecutor, defense attorney, judge, and bailiffs—as coordinated and mutually advantageous. According to this conception, defense attorneys constantly interact with other members of the workgroup in order to “cope with a case” at minimal cost to the workgroup itself and not to the defendant, who is induced to plead guilty (Eisenstein and Jacob 1977).<sup>2</sup>

This critical interpretation of the role of the defense attorney has encountered objections. Supporters of the normative version have perceived the model of the “system-oriented player” as an accusation against members of the profession for unprofessional rejection of the ethical principles of a conscientious defense. They have insisted that an admission of guilt and participation in negotiations at the pretrial stage do not mean that the defense attorney is playing a subordinate and dependent role. The process of behind-the-scenes negotiations between the prosecution and the defense, hidden from the eyes of sociologists engaged in observation of court proceedings, may include significant efforts by the defense attorney to have the interests of the defendant taken into account. In addition, a nonconfrontational and nonprovocative style of conducting negotiations is one of the criteria of professionalism and at the same time a successful tactic for upholding the client’s interests (Mather 1979; Maynard 1984). Conscientious attorneys participating in negotiations are sometimes compelled to appear to be “selling out” to the prosecution while actually bargaining for a better deal for the defendant.<sup>3</sup>

However, supporters of the normative model do acknowledge that the standards of “zealous” defense are rarely met. The real work of a professional defense attorney is far removed from the normatively embodied ideal and often aims not to conform with an ethical standard but to achieve a balance of interests between his client and other trial participants. Thus Rodney J. Uphoff,

testing Blumberg's idea of the defense attorney as a "double agent," arrived through empirical research at the conclusion that the best metaphor for the role of the attorney in a criminal case is a "beleaguered dealer." On the whole the attorney supports the position of the defendant (as the normative model requires), but in practice he runs up against the heavy workload of all members of the workgroup (the judge, the prosecutor, and himself), unequal access to resources, and pressure from the prosecution. As a result, a plea of guilty by the defendant seems to the "beleaguered dealer" the best of the possible outcomes. The author considers that the work of defense attorneys can be improved by strengthening the system of legal aid to the poor (who make up the overwhelming majority of defendants) (Uphoff 1992). Other studies draw attention to the fact that defense attorneys in criminal court proceedings not only face narrowly professional tasks but are also often compelled to perform the functions of social workers. This poses the question of the multitasking and flexibility of the role of the "conscientious" defense attorney. Thus a recent investigation conducted by Nicole van Cleve in a Chicago court showed that the majority of defendants suffer from mental illnesses and/or are drug addicts. Attorneys who follow the client-oriented version of the normative model of decision making have to integrate themselves into a broader context of assistance,<sup>4</sup> assuming at certain moments the role of mentor or therapist even with regard to nonlegal issues (van Cleve 2012).

In Russia it is widely recognized by criminal defenders that they play a role within the system, working *de facto* on the side of the prosecution (Sadokhin 2014). Accusations of dependent status are especially often directed against those attorneys who are appointed and paid by the state (namely by the judge or the investigator) to participate in a case on trial and pre trial stages rather than being hired and paid by the client himself. The law guarantees everyone a professional defense, whether or not he has the means to pay for an attorney's services (Article 51 of the Criminal Procedure Code of the RF). However, the participation of defense attorney by appointment places him in much greater dependence on the judge or the investigator who allocate cases

and signs the invoices for his work. In the professional milieu it is acknowledged that some state-appointed attorneys take the side of the prosecution and facilitate plea-bargaining and persuade the defendant, for instance, to confess or to choose the special procedure for hearing a criminal case, which saves considerable time and lightens the work of the judge and the prosecutor. (When there is a confession and special procedure is used, the court does not examine the content of the case on its merits, but confines itself mainly to determining the type and amount of punishment.) Recent sociological studies confirm this division of defense attorneys into types depending on how they are engaged in the case: “state” defenders appointed by the judge or the investigator and confrontational uncooperative attorneys hired by the client (Moiseeva 2014, pp. 93–94).

In our view, the two interpretations of the role of the defense attorney—the “zealous advocate” and the “system-oriented player” in the courtroom workgroup—are mutually compatible. They apply to diametrically opposed situations in which the attorney may find himself in the course of his work on a criminal case. The normative model of the zealous advocate serves as a starting point for empirical research into how professional standards and ethics are embodied in practice and how the institutional conditions that exist in the courts limit the scope of the conscientious attorney. Conversely, the model of the “system-oriented player” (“double agent,” “member of the courtroom workgroup”) focuses on the practice of attorneys who are more interested in meeting the institutionally determined expectations of other trial participants than in advancing the interests of the defendant.

These two perspectives can be combined if the corresponding models are not used to classify attorneys by their degree of conscientiousness, but applied to the roles played by attorneys under the specific conditions of the trial. In the course of his career and depending on the circumstances of individual cases, each attorney may choose and does in fact choose both the “client-oriented” and the “system-oriented” role corresponding to the two models. When an attorney is playing the client-oriented



role he is guided mainly by the interests of the defendant and/or client; as a “beleaguered dealer” he merely coordinates these interests with the expectations of the courtroom workgroup (Uphoff 1992). Conversely, when he chooses the system-oriented role in a case he acts as a “double agent” in the interests of the judge and prosecutor and “sells out” the defendant to them. The question of the factors and conditions that influence the choice between the system-oriented and the client-oriented role requires separate detailed investigation and lies outside the scope of this article. Here we focus on those practices that are used in order to fulfill the client-oriented, normative role of the defense attorney under the conditions of power asymmetry that characterize criminal proceedings in Russia.

### **Theoretical Assumptions and Method of Investigation**

In this article we present the results of an exploratory study conducted in 2013–14 by the Institute for the Rule of Law at the European University in St. Petersburg. The initial research questions with which we began the fieldwork stage were formulated as follows. What kind of role does the defense attorney play in practice in a criminal case? What scope does a zealous attorney have today for advancing the interests of his client? And how on the whole does the criminal defender choose his position and his strategy of practical action?

The study focused on everyday and practical aspects of the work of the attorney as an unequal participant in criminal proceedings, viewed through the prism of Scott and de Certeau’s theories of practical action. These authors discuss the creative role played by “weak” subordinate groups in their practical resistance to imposed rules and also methods of effective practical action against the efforts of power-holding actors.<sup>5</sup> The French philosopher Michel de Certeau proposes an analytical distinction between two types of practical action depending on the actor’s power potential of the actor—strategy and tactics (de Certeau 1984, pp. 35–38).<sup>6</sup>

*Strategy* is pursued by those who hold power. The actor is in a position to control space or territory by physical, visual, or other

means. He has the right to make the first move; he establishes a hierarchy in space, “introduces ranks,” formulates stipulations and rules of play, and supplements the spatial hierarchy with symbolic distinctions—a process that includes the ascription of given identities to all those who exist in this space. The basic goal of strategy as a type of action is to win and establish or strengthen power and control.

*Tactics*, according to de Certeau, is the approach of a dissenting subordinate actor when it is obvious that open opposition will lead to losses or defeat. It presupposes that “weak” subordinate actors do not have “their own place” and they act on territory that does not belong to them. In order to be effective, tactics are camouflaged as conformist behavior and requires the manipulation of identity and apparent compliance with the ascribed role. Actors are nonetheless aware of inner disagreement with the proposed hierarchy. As a counterweight to the hierarchical structures firmly imposed by power-holding subjects, tactical actors establish connections among themselves in the form of flexible networks that are intentionally nonhierarchical and dispersed in space. While the strength of strategic actors lies in control over space, that of tactical actors lies in the effective and flexible use of time. Choice of the right moment, the invention of new stratagems that the authorities are unable to predict, frequent change in decisions and modes of action—these are the main means by which those who are forced to act tactically achieve their goal. Unlike the strategic actor, the tactical actor does not set himself the final goal of winning and establishing his power “here and now.” His goal is not to lose.

In order to understand the practical aspects of the work of defense attorneys it is also important to study the ideas of Scott, who relies on historical and anthropological material about the “weapons of the weak.” The repertoire of weak groups (in Scott’s research—peasants) contains quite a few methods of concealed resistance—from sabotage to theft. Sometimes these methods are morally distasteful, based on deception, but weak players are in no position to choose. The methods of resistance used by the weak do not require complex coordination and planning; they are

based on informal ties. Resistance of this sort is organized by stealth and avoids open confrontation with the authorities (Scott 1985). An analytical category that is important for Scott is *mētis* as a specific kind of practical knowledge. And although this concept, borrowed from the ancient Greek, is usually translated as “cunning”. Scott prefers to define it as “wide array of practical skills and acquired intelligence in responding to a constantly changing natural and human environment” (Scott, 1998, p. 313). The power asymmetry of the trial and the formal and informal constraints placed on the defense attorney bring to the fore *mētis*—his practical knowledge of how best to arrange the defense under specific conditions. This type of knowledge is based not only and not so much on the letter of the law; much more important for the effectiveness of tactics is knowledge of the local “judicial landscape”—special characteristics of the practice of specific judges and investigators and procedural errors typically made by the prosecution. This knowledge is weakly codified and mostly unrecorded: it comes with experience.

The scholarly literature contains only isolated instances of the use of this kind of theoretical approach in empirical study of the work of defense attorneys in particular or lawyers in general. An example is the study by Mary Lay Schuster and Amy D. Proppen devoted to the organization of judicial proceedings in instances of violence against women and children in Minnesota. The authors identify a set of tactics that professional attorneys teach women for composing a victim impact statement: (1) recognizing the authority of the judge; (2) substantiating the complaint in terms of the ideology of the judicial system; (3) somewhat understating the circumstances of the crime and requesting a milder sentence, thereby giving the judge an opportunity to display his power and exercise broad discretion in decision making; (4) at the same time explaining all the psychological, physical, and financial consequences of the crime for the woman; and lastly (5) presenting the circumstances of the case in a form that will be institutionally acceptable to the court (Schuster and Proppen 2011, pp. 112–14). The authors show that without the assistance of a professional attorney, the victim,

being a weak participant in the trial, is unable to achieve her goals. Moreover, the attorneys who represent the interests of victims are themselves also external players and act mainly in a tactical manner.

The empirical investigation on which this article is based used a qualitative strategy of data collection. Our main method was unstandardized interviews with practicing attorneys in the city of St. Petersburg. Given the necessary level of trust, interviewing yields information about the broad spectrum of the attorney's actions in a case, including informal practices that remain hidden from a researcher who only observes court proceedings. At the same time the limitations of the method should be acknowledged: any narrative of practices is merely an interpretation of them. In this connection we focused less on the value judgments of our informants and paid more attention to descriptions of their practical actions and of the decisions they make in a case.

We interviewed eighteen defense attorneys. At the beginning we recruited respondents mainly by the snowball method, starting with practicing attorneys who had once interacted with the organization where we work. These attorneys recommended their colleagues to us, and the latter also shared contacts and gave recommendations. In addition, in spring 2014, while observing proceedings at one of the city's courts, we established contact with five new informants outside the institutional network. The special character of our initial sample design shaped the perspective of the interviews: the majority of our informants take a critical view of the way the criminal law is applied in practice. The overwhelming majority of them (seventeen of the eighteen) derive most of their earnings from work on the basis of agreements with clients. However, eight of them also have experience in work by state appointment. They themselves consider their experience atypical: the majority of Russian attorneys, they say, rely mainly on work by appointment, especially at the start of their careers. There are as yet no precise data that would confirm or refute this view. However, it is consistent with the fact that 62.6 percent of convicted persons are unemployed (Volkov et al. 2014, p. 13) and hardly in a position to pay for an attorney. A significant

proportion of our informants emphasized that they act in the interests of the defendant and not in those of the courtroom workgroup, both at the stage of the preliminary investigation and during the trial. Nevertheless, we are not inclined to assert a strict correlation between performance of the role of the active client-oriented defense attorney and work on the basis of contracts with clients. The interviews revealed quite a few examples of attorneys working by appointment who conducted a “zealous” defense. Unfortunately, qualitative data do not suffice to answer the question of how widespread the practice of active representation of the client’s interests in criminal proceedings is in Russia. Nevertheless, the information provided by this group of expert informants does suffice for a thick description of typical modes of action of defense attorneys playing the client-oriented role.

### **Accusatorial Bias and Asymmetry in Criminal Proceedings: The Defense Attorney As a “Weak” Party in Terms of Access to Resources**

This part of the article makes no claim to be a detailed exposition of the subtleties of criminal law and criminal procedure law. Our aim is to demonstrate the asymmetry in conditions of work on a case between the defense and the prosecution; this asymmetry places defense attorneys in an unequal position and they complain loudly about it. The imbalance between what the attorney can do and the powers of his opponents, who represent state bodies, compel him to react to their strategies in a tactical manner at all stages of criminal proceedings.

The day-to-day conduct of the preliminary and judicial investigation is organized in such a manner as to place the defense in an unequal position. The micro-level situation at the court session, as it is formatted by the criminal law not just in Russia but in any other country of the world (Schuster and Propen 2011, p. 33), reflects a power inequality that is embodied at the level of daily routine. The judge, as the main subject of strategy, exercises his right to control the space of the courtroom and everyone inside that space. It is the judge who reproduces the rules and

stipulations established by law and sometimes invents his own. The judge decides who may speak and in what order, who else may be present in the courtroom, and so on. At the pretrial stage of criminal prosecution the investigator or inquiry official, the procurator, and also law enforcement officials all possess greater power than the defense attorney over the case and over the suspect or the accused. The defense attorney always participates in criminal proceedings on “foreign” territory controlled by a state representative—whether in the courtroom, in the investigator’s office, or during procedural actions. Under Russian conditions this power asymmetry at the everyday level has specific features.

Formally the criminal law in Russia prescribes an adversarial process and gives defense attorneys the right to conduct their own investigation. However, the law does not establish rules for such investigations. Many attorneys report that their requests are habitually ignored. The law “On the Work of Attorneys and the Bar in the Russian Federation” obliges state bodies and organizations to give an attorney documents that he has requested or certified copies of them within one month of receiving the request. However, this law stipulates no penalties for refusing to examine an attorney’s request or provide him with information, so whether the attorney obtains the evidence he needs depends on the goodwill of officials in the organization to which the request was sent. “A competent legal adviser will see an attorney’s request, throw it in the trash can right away, and get on with his work” (male attorney with four years’ experience). Unlike the defense attorney, the investigator is a representative of a law enforcement agency that has broad powers to prosecute persons and organizations. Although the law stipulates no penalties for failing to respond to an investigator’s request either, legal advisers working for organizations—say our informants—dare not ignore the demands of state officials.

Well, of course, it is easier for an investigator at the Investigation Committee (IC), who will be sent all this the next day. . . . Of course, that is a state body, after all; they get back to state bodies as quickly as possible. And, second, if a military unit gets a call from a senior investigator of the Investigation Committee for especially important

cases, well, of course, they will respond faster than if they get a call from an attorney. (Female attorney with twelve years' experience)

Thus inequality between the defense and the prosecution is already manifested at the level of interaction with the external professional milieu.

This inequality is also manifest at the level of legally stipulated procedures. According to the Criminal Procedure Code, the investigator or inquiry official conducts the criminal case and carries out the preliminary investigation. He is the one responsible for attaching evidence from the prosecution and defense to the case materials, placing the defense in the dependent position of a suppliant who has to justify the need to add new evidences and thereby reveal his hand to the investigator (Sukharev 2013). Thus in the formally adversarial process of the preliminary investigation, one of the adversaries—the investigator—is in a position to constrain the actions of the other—the defense attorney. According to our informants, many investigators prefer to deny any petition from the defense attorney and refuse to attach defense evidence to the case file, while practically every procedural action of the investigator automatically generates officially recognized evidence. When he denies such a petition the investigator usually tells the attorney that he can enter a motion in court. However, the way in which the courts hear criminal cases also places the defense attorney in an unequal position vis-à-vis the prosecution party. In the eyes of the judge material prepared by the defense attorney is less weighty.

Well, you can make a record of testimony taken from eyewitnesses. But all that is dreary and does not actually pass in court. In one drug-related case, it is true, my client was acquitted with regard to one episode, but he was convicted with regard to another. Somehow the court acted as though we had not obtained that testimony. (Male attorney with four years' experience)

Practically all our informants said that the earlier a defense attorney enters a case the more likely it is that he will be able to help his client. If he enters the case before the suspect or the accused has given his first testimony, then he can teach him to

present his position in a legally competent manner and thereby prevent the investigator from putting a misleading slant on his testimony. Or he can help a witness work out his position before he is “prompted.” Delay in the attorney’s entry into the case places him in the position of having to “catch up” in collecting evidence and working with his client.

In initiating a criminal case the investigator relies on the materials of the operational check conducted by law enforcement personnel. Here lies his enormous institutional advantage over the defense. According to researchers at the Institute for the Rule of Law, it is precisely at this stage of the investigation that an informal decision is now made concerning the guilt of the future defendant—a decision that is practically irreversible once a specific person has been called in as a suspect or a charge brought against him (Shkliaruk, Titaev, and Paneiakh 2014). The asymmetry between the defense and the prosecution is manifest, for example, in the following sequence of steps in the work of the investigator with the suspect: initiation of a criminal case against an unknown person, then interrogation of the presumed suspect as a witness, to which the investigator is not obliged by law to invite an attorney. The result is that only later does the attorney enter the case—when his client is summoned for interrogation as a suspect or when a decision is made about a measure of suppression. By this time, the suspect has already formulated his testimony when interrogated as a witness. Formally testimony given as a witness loses its legal force as soon as the person turns from a witness into a suspect. In a specific communicative situation, however, it is much more difficult to change one’s testimony when interrogated again as a suspect. The defense attorney, having entered the case after his client has already given the investigator some sort of information in his testimony, is deprived of the chance to influence the perspective in which the investigator records and interprets this testimony.

The asymmetry between the defense and the prosecution in criminal proceedings arises not only from the disproportion in their rights as embodied in law but also from the established informal practices of participants—practices rooted in the inner logic of their organizations. Representatives of the state agencies



of criminal prosecution (law enforcement officials, investigators, procurators) are incorporated in a complex bureaucratic process, bound to instructions, and confined within rigid limits of subordination. Even judges, whose independence is stipulated by law, given the real mode of functioning of the courts in Russia, are directly dependent on supervision by court chairmen (Volkov et al. 2012).

One of the main reasons for the accusatorial bias in the Russian system of criminal justice is the interlocking character of the systemic indicators used in the law enforcement and judicial systems (Paneiakh 2011). The main negative criterion used in assessing the work of the procuracy and of law enforcement agencies is issuance of an acquittal or termination of a case on rehabilitating grounds. This leads the procuracy to appeal against every verdict of this kind. Thus in 2012 the courts of general jurisdiction acquitted 5,164 persons, while the courts of cassational and appellate appeal annulled the acquittals of 2,421 persons [*Dannye sudebnoi statistiki* 2013]. Similarly, the main negative criterion used in assessing the work of a judge is the annulment of his decision by a higher court. The result is that institutional rules compel judges to support the prosecution. Given these interlocking internal institutional incentives of different state establishments, the defense attorney—a weak participant in the case in terms of access to resources—has little chance of successfully defending his client.

Defense attorneys also detect inequality of the parties in the existing mechanism for reclassifying acts at the stage of the preliminary investigation. The main report indicator of the work of an investigation department (in police or in Investigation Committee) is the number of cases solved and brought to court. According to attorneys, at the level of informal rules, neither the law enforcement system nor the procuracy welcomes petitions from the defense to reclassify acts under a milder article. On the contrary, the indictment is usually based on the largest possible number of episodes and on the gravest possible corpus of a crime. This gives the investigator more procedural options and increases the probability of a conviction. As a result of the interlocking

institutional incentives, reclassification is not advantageous to the investigator. Our data show that the argument most frequently given by the investigator for denying an attorney's petition is the possibility of reclassification at the trial. For their part, judges, due to their heavy workload (including the preparation of report data for submission by procedural deadlines), do not usually look deeply into the content of a case (Paniakh et al., 2012, pp. 133–34) and it takes considerably effort by the defense attorney to get a case reclassified.

Every attorney knows how the preliminary detention of the suspect or the accused influences the nature of the verdict. Under the informal rules of the Russian judicial system, preliminary detention in custody greatly reduces the likelihood of acquittal or a suspended sentence (Titaev 2014). Petitions for detention in custody are heard by the judge on duty; moreover, although the law requires the demonstration of “concrete factual circumstances” as grounds for the detention of the suspect or the accused, in practice the judge relies on the conjectures of the investigator:

In considering a measure of restraint, again, [possibility] is interpreted as an assumption that the suspect may influence [witnesses] or go into hiding. That is, there should be a concrete argument: yes, the suspect has already tried to influence someone, threatened someone, forced someone to testify this or that. Or he has already been at Pulkovo [Airport] with the intention of catching a flight. He has already tried to go into hiding. But no such argument is made. It is solely a matter of conjecture. It is on that basis that the court decides to choose a measure of restraint in the form of detention in custody. (Male attorney with fifteen years' experience)

Another form of practical inequality between the parties in a criminal case is also connected with the detention of the suspect. In St. Petersburg, for instance, in order to get into the investigative isolation facility to coordinate his arguments with his client, an attorney has to take a place in a line on the street several hours before it opens (at about six o'clock in the morning), obtain a permit for a visit within an hour of opening time, and wait for many more hours in the investigations office before meeting with his

client. Formally the investigator has to go through the same procedure in order to meet with the suspect or the accused. However, he has other options: he can arrange for a prisoner to be delivered for an investigation action or conduct an interrogation before the suspect is placed in custody.

Attorneys also describe the situation regarding everyday interactions in the court building outside of the court session as asymmetric. Judges and procurators are in regular daily contact: procurators have their own offices in the building, do not leave the courtroom during the breaks between sessions, and drink tea with the judges in the conference room. It is only fair to note that our informants leveled similar accusations against some defense attorneys.

The need to satisfy quantitative criteria of effectiveness, high workloads, and accountability and subordination to the leadership in all spheres of their professional work lead personnel in state agencies and the courts to work out optimal scenarios of interaction that reduce the expenditure of resources. According to our informants, for example, the common practice of copying the verdict from the file of the indictment long ago became a cost-saving routine in Russian courts. A defense attorney who conscientiously complies with all the rules and procedures in accordance with the letter of the law is perceived as a participant who disrupts the routine of conveyor-belt justice. He encounters resistance from the subjects of strategy and is pushed out of the case by all possible means. For instance, a defendant who is a drug addict is persuaded by the investigator to give up the right to an attorney in exchange for a fix. Or when a court session has been scheduled at a time that is inconvenient for the defense attorney, the session is not rescheduled; instead another attorney is invited who is inclined to perform the system-oriented role of a member of the courtroom workgroup. These are no longer isolated instances: they are discussed both at public events attended by the most prominent attorneys and in personal conversations between attorneys.

Thus our interviews indicate that the reason the defense attorney is in a weak position in terms of access to resources

during his work on a criminal case is the asymmetry inherent in criminal proceedings at three levels.

The first level is that of the routine organization of criminal justice. This is not a specifically Russian feature: any judicial model of criminal investigation is formatted in such a way that the defense attorney and his work are under the control of the framers of strategy. He does his work on the case in a “foreign” professional space (the courtroom or the office the official conducting the investigation) and is compelled to adapt himself to the specific configurations of the working groups that dominate the investigation and trial.

The second level is that of the formal rules and procedures stipulated by law. Russian criminal procedure law specifies many instances in which the prosecutor and the investigator (the institutional representative of the law enforcement bodies) *de jure* possess much greater powers of control over the criminal case than the defense. Thus at the stage of the preinvestigation check, the law enforcement agencies (mainly police) collect information that the defense attorney has no opportunity to monitor. During the pre-trial investigation it is the investigator who exercises control over the case and decides whether one or another document is attached to the case file sent to the court. The defense attorney is required by law to petition for reclassification of his client’s act or for attachment of material to the case file. He lacks enough resources to conduct his own investigation, and the legislative regulation of his actions is insufficient.

The third level is that of informal practices with regard to compliance with existing formal rules and procedures—practices that serve the interests of the courtroom workgroup and contribute to the needs of law enforcement agencies. As a result of the interlocking of the intra-agency indicators used to assess the work of law enforcement structures, investigation bodies, and courts, even norms that embody equality between the prosecution and the defense are not observed in practice. Examples are the practice of the courts rejecting without explanation attorneys’ complaints against investigators’ actions, the practice of replacing attorneys who are not to the court’s liking, and the practice of restricting

attorneys' access to their imprisoned clients, and even the practice of court decisions violations in favor of defense.

Given the asymmetry between the parties in power and resources in the context of the accusatorial bias of criminal process in Russia, the defense attorney finds himself a subject of tactics in an client-oriented role in his contacts with the court and with law enforcement officials. He is able to act strategically only in intercourse with his client.

### **Strategies and Tactics of Defense Attorneys**

Normatively, the appointed task of the defense attorney is to uphold the interests of his client. Practically, in every specific instance this task is tackled in the context of an imperative for the prosecution part and the court—the imperative to establish and confirm the guilt of the accused as quickly as possible. Given the asymmetry of resources and the institutionally conditioned “weakness” of the defense attorney’s position, he has at his disposal a limited set of strategic actions. As we showed above, the options that the law of criminal procedure guarantees the attorney are blocked at the practical level, and even the daily routine is constructed in such a way that the attorney finds himself dependent on and under the control of the prosecution and the court.

The sole sphere over which the attorney can establish his own control is that of his relations with the weakest participant in the case—the accused or the defendant. When conversing with his client the attorney usually acts on his own territory—his office. This is where, in addition to settling the financial issue, he takes the step that is most important for a subject of strategy—*he asserts his own authority*. Demonstrating to the client his professional knowledge and skills, the attorney establishes a hierarchy in their relations and determines his dominant status in decision making. Often the attorney only enters the criminal case and makes his client’s acquaintance during proceedings on the territory of the investigation department or in police. In such instances the marker of his special status and professional importance is the trust of those who engaged him on behalf of the

accused. Although his main incentive to fight for the interests of his client is financial remuneration, zealous work in behalf defendant's interests when appointed by judge or investigators (a situation where the fee is modest) has its own rewards. Attorneys acknowledged that the main factors motivating active work by appointment were, first, the personality of the accused, and, second, the discovery of circumstances in the case that make it possible eventually to achieve an acquittal. The fact that an attorney has achieved an acquittal is regarded as the most significant marker of his professional success.

It is important to note that the strategy by which the attorney acquires a dominant role is at variance with normative expectations. According to the letter of the law, the defense attorney should act in behalf of his client and proceed from his position. However, the attorney who chooses a client-oriented role aims at maximum satisfaction of the interests of his client, and his first strategic task is to persuade the latter to trust his professional knowledge (*mētis*). After trust has been achieved and relations of domination and subordination have been established, the attorney's next important strategic action is to *establish control over the position of his client in light of the case materials*. This control may be established by means of directives or through discussion, depending on the work style of the attorney concerned. However, it is strategically important for the attorney not only to establish but also to develop his own position in the case with a view to possible outcomes. Testimony at the pretrial stage and during the trial, the submission of complaints, counterpetitions—all this is only formally agreed with the client but is actually within the attorney's sphere of control.

An inseparable part of the attorney's work with his client is the task of *explaining to him the asymmetry of criminal proceedings in Russia, sometimes even including psychological assistance*. Many accused persons who have fallen for the first time under the "steamroller of Russian justice" or their relatives have no idea of the magnitude of the accusatorial bias and are inclined to overestimate the probability of a favorable outcome. An honest attorney is therefore compelled to warn them that the chances of

an acquittal are very low. In this way he lowers their expectations and minimizes the risk that an unfavorable outcome poses to his own reputation.

In his relations with other participants in the case the defense attorney, as a “weak” party playing the client-oriented role, is unable to consistently follow the normative ideal of zealous defense; he is forced to adapt and occupy a wait-and-see position, giving priority to a tactical type of action. Based on the results of our interviews, it is possible to identify seven main tactics that such attorneys successfully use in a criminal case.

First, attorneys playing the client-oriented role strive to *maintain their image, emphasizing their own conformism* in playing their professional role and following procedures. This is achieved by various means: a business style in attire, marked politeness in speech, and literal compliance with the rules for conduct of a court session. There is an important difference between this tactic and the strategy by which the attorney establishes authority over his client: here the attorney has to adapt to rules and procedures set by others, including informal rules and procedures that apply in particular micro contexts. He must also be aware of the preferences of specific judges and the working rules of different investigation departments and use this practical knowledge in demonstrating his conformism. Finally, he must be aware of the internal institutional constraints under which judges, court officials, procurators, and investigators operate and understand their interests and the criteria used to assess their work.

Second, the tactical action of an attorney playing the client-oriented role does not require that the system give him full recognition as part of itself. On the contrary, it is important that he should *keep his distance and demonstrate it when the right time comes*. This is difficult: the attorney must give the investigator or the judge a clear hint that his priority is the interests of his client without undermining his conformist image. That is why this hint is usually accompanied by a demonstration of professionalism and predictability. This complicated task may be tackled in different ways. In rare instances the attorney may directly tell the judge and prosecutor what he intends to do in the case and openly

warn them how he will respond to possible decisions on their part. In the majority of instances the attorney does not reveal his plan of action. He may seek permission from the judge or investigator to tape-record a session or investigative actions, or to photograph case materials; this gives the other participants to understand that he is interested in recording all stages of the proceedings and is acting in a client-oriented role. Professionalism usually finds expression in competently composed petitions (brief and to the point) and in well-substantiated materials presented by the defense.

Third, the defense attorney is compelled to use any opportunity to *monitor the case in search of procedural errors in order to reveal significant contradictions*. The defense, with very limited scope for collecting evidence during the pretrial investigation, uses any means at its disposal to reduce uncertainty and accumulates knowledge of various procedural blunders committed by the prosecution party. Defense attorneys who actively fight for the interests of their client say in the interviews that taking photographs of all case materials that fall into their hands—for example, during investigative actions or at court sessions to settle the question of preliminary detention—is not only a demonstrative action (as we showed above). These photographs are then carefully examined and documents are collated with a view to discovering procedural errors or serious violations such as forgery. This gives the attorney a tactical advantage.<sup>7</sup> According to our informants, the number of procedural errors made by investigators is increasing from year to year, but the courts prefer “not to find fault.” Similarly, they say, instances of investigators falsifying procedural documents have become more frequent in recent years. And although the proportion of complaints against actions of officials conducting criminal proceedings (under Article 125 of the Criminal Procedure Code of the RF) that are accepted by the courts fell from 16 percent in 2009 to 8.7 percent in 2012 (*Dannye sudebnoi statistiki* 2013) serious procedural errors by investigators enable attorneys (as we will show below) to make a deal: in exchange for overlooking violations of procedural norms they obtain a



reduction in punishment for the defendant or in the number of episodes with which he is charged.

Fourth, a typical tactic used by the conscientious attorney is not only to pay close attention to procedural errors but also to *make use of all substantive contradictions in the case*. The attorney who uses this tactic seeks out information independently, submitting requests to organizations and consulting experts, even though (as we showed above) asymmetric rules and inequality of resources seriously limit his ability to collect evidences. An important tactical resource of the attorney is his ability to prove to the court (more rarely—to the investigator) that it is necessary to attach defense materials and independent outside expert assessments testimony to the case file. Although the defense has a right to file a motion to put defense evidences into the case, the court may deny to repeat an expert testimony and uses that was filed to the case by investigator: “They do not even allow us to get an expert assessment on this topic. They simply don’t allow it. They say that all this is a subjective perception of the attorney” (male attorney with two years’ experience). The results of an independent expert testimony may be regarded by court as the conclusion of a specialist, which in practice has less weight as evidence than the conclusion of an expert. The judge may consider that an independent expert is less reliable and trustworthy. It is difficult to enumerate all the grounds given for ignoring defense evidence, but it can be confidently asserted that the ability to persuade a judge to take such evidence into account is a special advantage and skill for an attorney to possess. An experienced attorney is useful to his client above all by virtue of his social ties within the expert milieu. Acquaintanceship with laboratory personnel and mastery of the practical skill of getting their conclusions attached to the case materials enables the zealous attorney not only to have an expert testimony made more quickly and more competently than in a state laboratory but also to summon an expert to court as a witness.

Few [attorneys] are able to get the court to order a second expert testimony.<sup>8</sup> Some attorneys do not know what to do. You need to have your own expert institution and somehow come to an agreement with

the specialists about what they should write. This, of course, all has to be done without money. But the specialists have an interest in helping out. Later the court will summon them and pay them for all this. There are all sorts of nuances here about which no one will tell you. (Male attorney with four years' experience)

Fifth, if the client can pay enough, then control over the materials of the criminal case can be achieved tactically *by involving several attorneys in the case and having them work as a group*. By attaching an attorney to each witness the group is able to exercise control over the case materials. Unlike their opponents (investigators, procurators, and judges), professional defense attorneys are not bound together in a hierarchy with compulsory organizational ties. The informal collectives that emerge are unstable, based on voluntary consent to participate in a case in a specific role. Flexible collegial networks make it possible in each case to engage narrow specialists in a number of areas of legal work. No question arises concerning hierarchical relations within the group: all members recognize the preferential rights of the attorney paid by the client. In each new “group project” the hierarchy within the team of attorneys is established anew. The tactic of group work on a case makes it possible significantly to strengthen control over its substantive aspect, inasmuch as the attorney of each witness knows the testimony of the witness whom he helps, while as a group the attorneys know all the testimony of the defense witnesses. At the same time, the narrow specialization of the participants makes it possible to use their special abilities and acquaintanceships; this expands the overall *mētis* of the group and its tactical resources as a whole by comparison with the attorney acting on his own.

Sixth, attorneys are *tactically prepared to make a deal in the client's interest*. As already noted, their most common bargaining chips are admission of guilt and consent to the special procedure for hearing the case. This considerably lightens the work of all participants in criminal proceedings: it saves the judge working time, minimizes the likelihood of the verdict being appealed, and satisfies the organizational interests of the procurator and the investigator. The sole legally guaranteed advantage for the

defendant who has consented to use of the special procedure is a one-third reduction of the maximum sentence. According to a statistical study of court decisions, the special procedure gives the defendant no substantive advantage because judges rarely impose sentences longer than two-thirds of the maximum even when the standard procedure is used (Volkov et al., 2014, p. 45). This is also well-known to attorneys from their experience in courts. Some of our informants do not use this tactic. “If you don’t want to fight, then allow the case to be heard in accordance with the special procedure and don’t torment yourself” (male attorney with two years’ experience). “Then for what do I take money? The special procedure means that you condemn yourself” (male attorney with four years’ experience). Attorneys of this type do not usually seek dialogue with the investigator but concentrate on collecting evidentiary materials and presenting them in court.

Some of our respondents, however, do consider that deals with the prosecution party, including deals involving the confession, can be useful to the client. Due to the asymmetry in criminal proceedings, the prosecution is not interested in dialogue with the defense, and admission of guilt is the main bargaining chip at the disposal of the active defense attorney. In exchange for consent to use of special procedure, it is possible, for instance, to get the defendant a suspended sentence, have one or more episodes removed from the indictment, or avoid preliminary detention.<sup>9</sup> The timely announcement of confession may incline the judge toward the defense and lead to a punishment milder than would have been set at the end of a long-drawn-out court hearing.

At the stage of the pretrial investigation, being at a disadvantage, attorneys understand that their best tactic is to win the cooperation of the investigator in the process of compiling the case materials. It is at this stage that every attorney concerned to advance the interests of his client starts his tactical “dance with the investigator.” On the one hand, he must demonstrate a high level of professionalism in order to ensure that the opponent understands that he is not dealing with a simpleton. On the other hand, it is important for him to convey that he will petition only with regard to the substance of the case and not distract the investigator with

trivial complaints. For understandable reasons, our respondents provide few hints of any role played by corruption in this sort of cooperation in the interests of the suspect; nor, however, do they deny the existence of such corruption. Furthermore, attorneys view this as the optimal tactic to solve the client's problems at the stage of the preinvestigation check, when the police are still working on the materials of the check and no final decision has yet been made to initiate a criminal case.

Attorneys understand that from a moral point of view the tactic of informal negotiations does not seem fully consistent with the normative ideal of the defense attorney. For example, it is advantageous to "sell out" or incriminate other suspects, guaranteeing certain concessions by the prosecution to his client alone but harming others. Respondents note that such deals are usually made with the investigator or even earlier, at the stage of the preinvestigation check, with detectives. In this situation it is an important practical skill for the attorney to know how to sustain the deal at all the stages through which the case passes, taking state agencies interests into account. Thus, for instance, an agreement reached with a police detective does not lead automatically to corresponding concessions by the investigator or by the procurator supporting the charge, let alone guarantee the favor of the judge. In such instances the attorney has to devote a considerable part of his efforts to the informal process of securing reaffirmation of the deal at each stage through which the case passes, and ensuring that the promised reduction in punishment or reclassification of his client's act is actually delivered.

Another outcome that the prosecution (procurator, investigator) or the judge may offer in a deal in cases that have a high probability of "crashing and burning" in court is termination of the case on nonrehabilitating grounds (conciliation between the parties, repentance, expiration of the period of limitations of execution of judgment, or as a result of an amnesty). Unlike acquittal or termination of a case on rehabilitating grounds (absence of the event of a crime or nonparticipation in the crime), grounds of this kind give the defendant the status of a person who has committed a crime and admitted his guilt. It is in the interests

of the procurator and investigator to decrease the defendant's chance of being acquitted and rehabilitated. At the same time, the defense attorney, soberly appraising the prospects of acquittal in the context of the accusatorial bias, is compelled to consent to an outcome of this kind: at least it prevents the real losses that his client would incur in terms of time, money, and even health were he sentenced to a real term of incarceration.

In general, informal agreements are a routine part of the attorney's work: various conditions are informally traded at all stages of criminal proceedings. Not infrequently attorneys agree to overlook procedural errors of the investigator or procurator in exchange for a milder verdict or for the inclusion of their materials in the case file.

And finally, seventh, the main advantage of the defense attorney in his tactics towards other participants in the case is *control over time*. All his accumulated resources (procedural errors made during the preliminary investigation; substantive materials, including expert assessments; admission of guilt, etc.) mean nothing in themselves. They will acquire special significance if they are used at the *right* moment. Here there are no general recipes: choosing when to use a defense argument is a concrete personal choice. There are only general logical schemas, which are not, however, uniquely correct. For example, it is tactically more correct to use procedural errors of the investigator (in particular, forgery) at the trial stage, when the case has been prepared and signed by the procurator. Tactics such as the deal or the filling with defense materials the case give the attorney wider scope in choice of a moment. Some informants said that they had successfully used the tactic of interrogating a witness before the investigator did so. Knowing that the first interrogation imposes a specific vantage point (through the sequencing of questions and their content), they used the chance to engage the witness first in the interests of their client.

Control over time also includes manipulation of the speed of the case proceedings—from rapidly settling the case in accordance with the special procedure to deliberately dragging out the proceedings. This is an important tactical resource of the

defense because compliance with procedural time limits is one of the main intradepartmental criteria used to assess the work of investigators and judges. Defense attorneys, however, view the dragging out of the proceedings as a good legal means of solving their clients' problems. It has two advantageous results: under some articles "the period of limitations expires,"<sup>10</sup> and the case may be terminated; or the case may be returned for further investigation, which often means that the case will not be brought to court again. Given that criminal cases are generated in the law enforcement structures in a conveyor-belt manner, on the basis of a points system, it may prove effective to count on dragging out the process of preparing and hearing the case. However, the results of this tactic are hard to predict. It may have negative consequences: it increases the workload of the judge and this may have a negative effect on the severity of the punishment in the event of a conviction. The dragging-out tactic is therefore most successful when for one reason or another the judge does not want to convict the defendant and is surreptitiously helping the defense attorney. Thus dragging out the proceedings, returning the case for further investigation, and terminating the case due to expiration of the period of limitations all represent an informal deal between the defense and the court. In order to carry through this tactic successfully, the attorney must persuade the judge that the charge is false and that there is a high likelihood of its annulment. The prosecution, if it is aware of procedural defects in the case, may agree to these conditions.

In this article we have focused on the main tactics and resources of the defense—those often mentioned by our informants. There are also other tactics that are used more rarely. One example is to appeal to human rights organizations and to contacts of the attorney in the mass media in order to draw public attention to the case. This breaks the routine of system-oriented participants in the case, compels them to act with greater circumspection, and somewhat reduces their ability to apply informal rules. If the case attracts a high level of public attention, then the work of the investigator in preparing the case materials and of the judge in appraising them becomes generally known and it becomes risky

to use such methods as groundlessly denying petitions of the defense attorney or pushing him out of the case. For this tactic to succeed, however, the case must be of a special character—there must be substantial violations of the rights of participants, these violations must be known to the public, and the attorney and his client must have broad public support. Cases of this kind are not part of the day-to-day routine of the attorney's work.

Thus the main sphere of strategic action for the attorney is his relations with his client and with the person he is defending. It is here that he sets his own rules and monitors compliance with them. This zone of professional responsibility of the attorney contains the following elements:

- establishing his authority on the basis of his professional experience (this depends not so much on knowledge of the letter of the law as on pragmatic knowledge and skill in applying it);
- establishing control over the defendant's position (this is somewhat at variance with the norm of complete support for the position of the defendant; in practice the attorney playing the client-oriented role shapes and develops the position of his client in light of the circumstances of the case);
- giving psychological assistance to his client and explaining to him the realities of the pro-prosecution bias in Russian criminal justice (this helps to lower his expectations and minimize the risks to the attorney if the case is lost).

When dealing with all other participants in the criminal case the attorney playing the client-oriented role acts predominantly in the tactical mode. On the basis of our interviews, we have identified a wide range of tactics used by such attorneys. In order to be "accepted" in a "foreign" milieu, they use the tactic of mimicry and project the image of the conformist professional jurist. At the same time, they use various means to convey hints to prosecutors and judges that they are acting in the client-oriented role and giving priority to their defendant's interests. They demonstrate competence and predictability, which become the

basis for constructive interaction between the parties. Monitoring of procedural errors and an active search for substantive evidence are also tactical types of action insofar as they require from the attorney the special skill of getting this evidence attached to the case materials in the context of power asymmetry and the accusatorial bias. Collective work on a case within the framework of spontaneous, unstructured, and flexible professional networks is another tactical advantage of the defense over the rigidly hierarchical and narrowly constrained bureaucratic working methods of the prosecution part and the court. Collective work also raises the general level of tactical resistance in a case. Wide use of informal behind-the-scenes agreements is yet another important part of the attorney's tactics—practically any defense argument may become an informal bargaining chip (from admission of guilt to willingness to overlook serious procedural violations). And finally, the most important tactical advantage of the defense attorney is his control over time. Choice of the right moment to articulate an argument and manipulation of the speed of the investigation and trial are basic resources of the defense attorney as a weak party in criminal proceedings.

## **Conclusion**

In this article we have focused on the everyday routine of the defense attorney who chooses to play the client-oriented role in a specific criminal case. This role involves giving priority to the interests of the client and striving to reconcile those interests with the expectations of the subjects of criminal proceeding (the prosecution and the court). Uphoff's metaphor of the attorney as a "beleaguered dealer" well describes the day-to-day routine of the attorney playing the client-oriented role. However, our analysis of the practical aspects of the everyday professional work of the attorney has shown that the practical realization of the normative model of "zealous and conscientious defense" underlying the client-oriented position is often at variance with basic ethical principles.

Viewing the profession of defense attorney in Russia through the prism of the theory of practical action highlights not only the



“weakness” of the defense but also—paradoxical as it may seem—how that very “weakness” can lead to the success of the attorney’s actions. De Certeau’s distinction between the two types of action (strategy and tactics), depending on the actors’ power potential, enables us to look at the everyday routine of Russian defense attorneys as subjects simultaneously of strategic action (in relation to the client) and of tactical action (in relation to other, institutionally more powerful participants in the case).

All our respondents described contemporary criminal proceedings as asymmetrical. Asymmetry exists not only where it is embodied in norms of the Criminal Procedure Code but also where the law formally stipulates an adversarial process. The privileged position of the law enforcement bodies is maintained by “flexible” interpretation of the law at all the stages through which a criminal case moves (the preinvestigation check, the pretrial investigation, the trial, and the appeal). Under prevailing conditions of inequality, active defense attorneys view acquittal or termination of the case on rehabilitating grounds (which have a negative impact on appraisal of the work of the law enforcement system) as unattainable goals. Attorneys who play the client-oriented role and uphold the interests of their defendants in criminal proceedings are not romantic Don Quixotes tilting at the windmills of criminal prosecution, but pragmatists and realists. Most of them are engaged in routine work and not in highly publicized political trials. The priority of the client’s interests is the guiding principle of their work. Faced with the choice between the tiny likelihood of an acquittal (despite obvious defects in the investigation) and the possibility, for instance, of agreeing to the charge in exchange for a suspended sentence, they will choose the latter and give their client a chance to avoid imprisonment. In the context of the pro-prosecution bias it is strategically preferable to agree to the charge even if the client is not guilty. Of course, this lightens the work of the judge and investigator. True, it has a negative impact on the image of attorneys as a professional group. However, in pursuing the interests of their clients, attorneys regard any outcome that does not entail real punishment as equivalent to acquittal. The most

desirable means of defending the defendant is to get the case returned for further investigation by exploiting errors in the presentation of the case materials and/or in the evidentiary base. If this does not work, then an effective tactic may be to drag out the case in court in order to have it terminated due to expiration of the period of limitations. Yet another tactic is to get the expert community onto one's side; successful attorneys often have sufficient authority and connections to achieve this. It is very difficult to overcome the institutional asymmetry of the criminal process on one's own. If the possibility exists—in other words, if the client has enough money—then attorneys form a group. Not only defending the accused but also representing the interests of witnesses, the group of attorneys overcomes the closed character of the investigation and acquires control over proceedings in the case. Thus, even though the adversarial nature of the process is not in practice guaranteed and the likelihood of an acquittal is negligible, the conscientious attorney still has legal means of minimizing risks for his client.

The moral dimension of these means is a special question. Unfortunately, the “weapons of the weak” (Scott) do not always “smell good.” If the law formally asserts that proceedings are adversarial in character and at the same time weakly regulates the actions open to the defense, if even legally guaranteed rights are systematically violated in practice, then it is not surprising that few means of strategic action remain in the arsenal of the active defense attorney. It is precisely the asymmetry of the criminal process and the institutionally conditioned weakness of attorneys in terms of access to resources that explain why they give priority to tactics and why they are willing to resort to any conceivable means of defending the interests of people who have fallen under the steamroller of Russian justice.

## Notes

1. Here and henceforth the terms “zealous,” “assiduous,” and “conscientious” as applied to the work of an attorney will be used as synonyms pertaining to the normatively given role of the defense attorney in a criminal case.

2. For a brief review of Eisenstein and Jacob's classic study *Felony Justice* (1977), see Ekaterina Moiseeva, "Mikropolitika suda" in *Sotsiologičeskaja vlasti* 2015, no. 27 (2), pp. 243–252.

3. See the description of a specific instance in which the defense attorney negotiated with the state attorney and judge and bargained for a six months' reduction in the sentence but agreed to support a real term for the defendant and let the prosecution decide the size of the penalty (van Cleve 2012, p. 314).

4. This relatively new version of the normative model recognizes that clients possess intellectual and cultural experience that can help the attorney make the most effective decision. For a more detailed account of the client-oriented approach see Binder, Bergman, and Price (1991).

5. For a systematic presentation in Russian see chapter 11 in Volkov and Kharkhordin (2008, pp. 193–208).

6. It should be said that in this article we do not attach the usual meanings to the terms "strategy" and "tactics." In specialized legal literature, including literature aimed at defense attorneys, "strategy" usually refers to the overall goal of the defense whereas "tactics" refers to a specific line of conduct at a particular stage of work on a case. In this article we follow de Certeau in drawing a quite different distinction between strategy and tactics.

7. "Procedural errors" usually refers to substantial violations by a body of preliminary investigation or (more rarely) by a court of norms of criminal procedure law—case materials that are incorrectly formatted, violate time limits, or contain other procedural defects. Here we cite just one example, but a very vivid one. One of our informants found an error in an order to schedule an expert assessment: by mistake the investigator had typed "acquaint" (*oznakomlenii*) instead of "schedule" (*naznachenii*) and corrected it by hand when signing it. "And then the case was handed to another investigator and when I studied the case . . . the first thing I looked for, of course, was the order, because I knew that it contained a violation. And I found that it was a quite different order, with my signature written in someone else's handwriting. . . . I said to the investigator: 'Do you understand that were I to reveal this in court your expert testimony of assault and robbery would be deemed inadmissible evidence? And then you will have no assault and robbery, and that will be very bad for you. And so-and-so [the previous investigator—authors' note] was dismissed, and then you take the case to court with a falsified document.' He sat there and looked at me like this. 'OK, we'll do something.' 'Yes, let's do something.' And then, you know, he made concessions in the case. Because it was a mixed bag. . . . In court it would lead to the judge issuing an order to exclude the testimony as evidence. The procurator would petition for the conduct of a second testimony and my client would still be charged with robbery. There would be no change there. But the investigator would have big problems. So you start to play on these problems of his. In other words, I understand that for me there is no way out of the situation but for him there is a way out" (female attorney with thirteen years' experience).

8. The informant is referring to a second expert testimony ordered by the court for the purpose of rechecking the results of the expert testimony conducted at the stage of the preliminary investigation.

9. Using data from 10,000 court decisions in criminal cases in 2011, Kirill Titaev shows a positive correlation between admission of guilt and the willingness of the investigator to drop the initial charge (Titaev 2014, p. 103).

10. For many articles of the Criminal Code there is a “period of limitations” from the time when the crime is committed, upon the expiration of which the lawbreaker is released from criminal liability and punishment. By dragging out proceedings, the defense attorney can get the case terminated due to expiration of the period of limitations.

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