




The Lawyer Monopoly in a Global Context



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Summary of Remarks



1. **Intro**
2. **Caveats**
3. **The Conventional Wisdom re Global UPL**
4. **Data that Raises Questions about the Conventional Wisdom**
 - EU Studies
 - 2013 IBA Report
 - WTO *Schedules of Specific Commitments*
5. **Conclusion**

Who Cares? Why Pick this Topic?

- Lawyer monopolies are under fire
- Cross-cultural and cross-professional comparisons are common (& should be undertaken)
- I am skeptical of the “conventional wisdom”
- I would like to prompt more research on this topic



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Caveats

- My conclusions are modest and limited by the existing cross-cultural UPL info
- In some (many?) countries, the scope of the legal profession’s monopoly is unclear. *E.g.*,
 - U.S.
 - India
 - Japan
- Info about *quality* is even sparser

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The Conventional Wisdom...

“In most jurisdictions, lawyers only enjoy a monopoly over representing clients in courts.”

Source:



<http://www.oecd.org/dataoecd/12/38/40080343.pdf>

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The *Conventional Wisdom* is Suspect



- Info that seems inconsistent with the “conventional wisdom” re the global legal profession monopoly:
 - *EU studies*
 - *2013 IBA Report*
 - *WTO Schedules of Specific Commitments*

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EU Professional Services Initiative

- 2003: the EU launched its competition study
- This was part of a larger pattern seen elsewhere
- The legal profession was one of 5 professions
- “Exclusive rights” was one of 5 issues
- See, e.g., Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 Northwestern J. Int'l L. & Bus. 1 (2009)

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Table 3-7 Legal Services (Lawyers): Scope of Activities

IHS — Paterson, Fink, Ogun et al. / Regulation of Professional Services — 47

- **BLACK** = legal representation and legal advice (and sometimes other additional tasks) may only be offered by one or more specific prof.
- **DARK GREY** = legal representation only is the exclusive right of specific professions, but not legal advice
- **LIGHT GREY** = little (Sweden) or no (Finland) monopoly over repres. or advice

Country	Profession	Advice domestic law
XX = Exercise reserved; X = Activity exercised, but not reserved		
Austria	Rechtsanwalt (Lawyer)	XX
Belgium	Advocaat /Advocate	X
Denmark	Advokat (Attorney at Law)	XX
Finland	Advocate	X
	Lawyer	X
France	Avocat	XX
Germany	Rechtsanwalt (Attorney at law)	XX
Greece	Dikigoros (Advocate)	XX
Italy	Accocato (Lawyer)	X
Ireland	Barrister	
	Solicitor	X
Luxembourg	Acocat (Advocate)	XX
Netherlands	Advocaat (Agttorney at Law)	X
Portugal	Advogado	XX
Spain	Abogado	XX
	Precurador	
Sweden	Advokat (Advocate/avocat)	X
United Kingdom	Solicitor	X
(Engl.+Wales)	Barrister	X

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2012 Study of EU Mobility Framework

- Large scale EU-commissioned report
- Table 2.2, Column 3 asked whether “legal advice” was a reserved activity:
 - 16 entries said “yes” reserved; 14 said “no”



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2012 CSES Inventory of Reserved Activity

Table 2.9: The legal profession — reserves of activities by task (EU13)

Type of reserve	Legal advice (domestic / foreign law)	Conveyancing	Representation before courts	Representation before administrative agencies (including tax matters)	Tax advice	Representing clients on patent matters	Other legal services (please specify under notes)	Total
Exclusive	6	2	9	5	2	4	3	31
Shared	3	8	10	5	2	8	5	41
Total (exclusive and shared)	9	10	19	10	4	12	8	72

Note: NACE code 69 *Legal and accounting activities*

Conclusion:

These three EU studies might lead one to question – for the EU at least - the OECD’s *conventional wisdom*.

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The IBA's 2013 Global 'Snapshot'

- Q. 2: Under what title do lawyers practise in this jurisdiction? (e.g. Advocate)
- Q.3: Does a lawyer need a licence to practise, if so how does he/she obtain a licence and how often must this be renewed?
- Q. 5: Are there certain activities that are "reserved" to those who are licensed to practise law in the jurisdiction?

See IBA Global Cross-Border Legal Services Report 2013
prepared by Hook International [Alison Hook]

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IBA Global Legal Services Report

- Penultimate Draft at IBA Oct. 2013 Boston mtg.
- Should be available online and in hard copy
- Will be used by the WTO and World Bank
- Contains information on more than 80 countries
- Provides a "snapshot" of many useful global lawyer regulation issues as of August 2013
- Contains *disclaimers* because of the difficulty of obtaining this type of regulatory information

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IBA Results: South America

- **Advice and Representation**: *All of the IBA descriptions for South America list as reserved activities both representation and advice:*

“Only [Argentine, Brazilian, Chilean, Colombian, Paraguayan, Peruvian, Venezuelan] lawyers have rights of audience in court and can provide advice on the law of [that particular country].”

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IBA Results #2: Middle East & Africa

Some but not all have “advice” as reserved:

- **Advice & Representation**: Oman & Qatar define the practice of law to include representation AND the provision of legal opinions & the drafting of contracts. Also Israel & Brunei Darussalam
- **Representation Only**: is the reserved activity listed for DRO Congo, Kuwait, Sudan, Tunisia, & UAE (Abu Dhabi)
- **Unclear**: The Q.5 IBA Survey entries for Algeria, Bahrain, Egypt, Jordan, Lebanon, Morocco, Saudi Arabia & Syria do not rule out “advice” as a reserved activity. UAE (Dubai) has a separate registration process.

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Central Asia IBA Results:

- **Representation Only**: Representation is the only reserved activity listed for Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, & Ukraine
- **Divided Profession**: Representation is reserved to Belarus Advocates. “Legal advisers” are limited to advice activities
- **Unclear**: The Q.5 IBA Survey entries for Armenia, Azerbaijan, & Turkmenistan do not rule out “advice” as well as court work as reserved activities. The IBA survey says the law in Tajikistan & Uzbekistan is unclear.

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Additional IBA Results

- **Reserved for Advice & Representation**
 - Australia & Canada (all states, provinces, territories)
 - Central America: Costa Rica, Mexico, & Panama
 - Asia: Hong Kong, Korea, Taiwan, & Turkey
- **Representation only**
 - Jamaica, Moldova, Sri Lanka (conveyancing if separately licensed), & Thailand
- **Report doesn't clearly specify**
 - India (but cases say it is both), Japan (see earlier slide), New Zealand, & Pakistan

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Source #3: WTO GATS Schedules

**WORLD TRADE
ORGANIZATION**

RESTRICTED

S/C/W/318
14 June 2010

(10-3212)

Council for Trade in Services

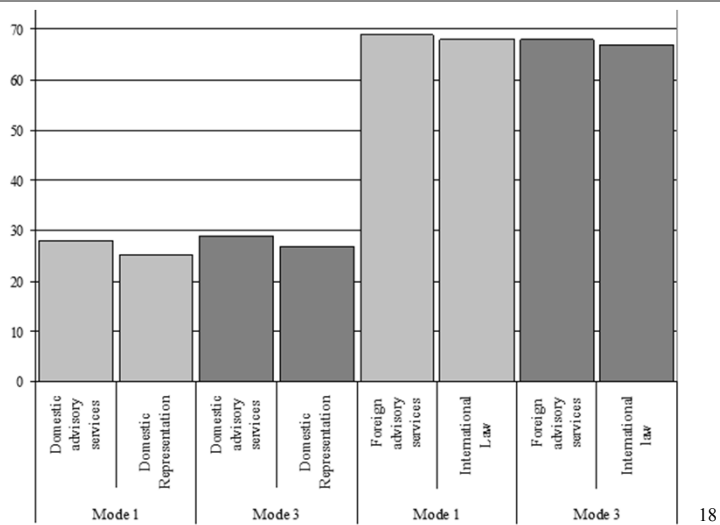
LEGAL SERVICES

Background Note by the Secretariat¹

As summarized in Council for Trade in Services, Background Note by the Secretariat: Legal Services, S/C/W/318 (June 14, 2010), §V Annex III

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WTO Chart Illustrating Commitments



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The WTO's Summary re Legal Services

- The most commitments are in advisory services in home country law (69 for Mode 1, 68 for Mode 3)
- ≈ 60 *Schedules* limit commitments to advisory-consultancy services on home country (i.e. foreign) law & internat'l law, excluding domestic law
- Advisory services in host country law: (28-Mode 1; 29-Mode 3)
- Representational services in host country-law (25 in Mode 1; 27 in Mode 3)
- 13 used the classification contained in W/120, referring to CPC 861 without modification [thus both advisory + rep.]

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You may be asking.....huh???

My Take-Away Points:

- Given the GATS' structure, there are limited lessons to learn from WTO Members' *Schedules*
- *BUT*....at least 69 countries described "advisory services" as a subset of legal services
- 60 countries made legal services commitments for advisory services, but excluded domestic law
- This pattern suggests (*to me*) UPL rules on transactional as well as representational work

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Do these Sources Address Quality?

- **There is very little information on the quality of legal services:**

The IHS Report reaches the conclusion that “the lower regulation strategies which work in one Member State might be made to work in another, without decreasing the quality of professional services, and for the ultimate benefit of the consumer.” ... However, this conclusion may be too strong, for three reasons. OECD Report on Competition in Legal Services (2007) at 27.

- **We need better research on:**

- 1) UPL rules; 2) the *quality* of legal services; and
- 3) *access* to legal services

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Other Sources of Global Info

- **Indirect or Inferential Information:**

- APEC Legal Services Inventory
- Dombrow et. al., ABA GUIDE TO INTERNAT’L BAR ADMISSIONS (2012)
- Additional studies (see forthcoming paper)

- **Anecdotal evidence and contacts**

- **This area is ripe for further work**

- Internat’l Conference [Network] of Legal Regulators
- International Association of Legal Ethics
- IBA BIC Regulation Committee

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Conclusion

- Cross-professional/cultural research is useful
- Be skeptical of the *conventional wisdom re UPL*
- In a number of jurisdictions, transactional work or “advice” is a “reserved” legal activity
- The US has one of the broader monopolies
- More research is needed on UPL, access & quality
- BUT events may overtake research

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Conclusion – Part #2

- Lawyer regulators may not be in control of defining the legal profession’s monopoly:
 - Expect continued governmental antitrust pressure
 - Other pressures on lawyer regulation (who-what-when-where-why-and-how issues)
 - It’s difficult to define the practice of law in an exclusive sense (particularly against \$-backed Δ s)
 - The power of market forces & “disruptive innovation”

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Conclusion – Part #3

- Lawyers should expect:
 - to see increased competition
 - to see pressure to create a monopoly system based on titles not activities
- Lawyers will have to reinvent themselves and find ways to add value to clients

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To Read More About It ...



- Iain Paterson, Marcel Fink, Anthony Ogus, et al., *Economic impact of regulation in the field of liberal professions in different Member States: Regulation of Professional Services, Final Report – Parts 1-3* (Jan. 2003), http://ec.europa.eu/competition/sectors/professional_services/studies/studies.html
- [Panteia-Maastricht University], *Evaluation of the Legal Framework for the Free Movement of Lawyers*, (Nov. 28, 2012), http://ec.europa.eu/internal_market/qualifications/docs/studies/2013-lawyers/report_en.pdf
- [CSES], *Study to Provide an Inventory of Reserves of Activities linked to Professional Qualifications Requirements in 13 EU Member States & Assessing their Economic Impact, Final Report* (Jan. 2012), http://ec.europa.eu/internal_market/qualifications/external_studies/index_en.htm
- Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 *Northwestern J. Int'l L. & Bus.* 1 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374855
- Laurel S. Terry, *Putting the Legal Profession's Monopoly on the Practice of Law in a Global Context*, 82 *Fordham L. Rev.* __ (2014)(forthcoming) 26



Additional Resources...

- **World Trade Organization, Secretariat Background Report on Legal Services, S/C/W/38 (June 2010),**

http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/wto_legal_services.authcheckdam.pdf

- **APEC Legal Services Inventory**

– <http://www.legalservices.apec.org/overview.html>

- **International Conference of Legal Regulators**

– <http://www.international-conference-of-legal-regulators.org/>

- **International Association of Legal Ethics (and the biennial International Legal Ethics Conferences)**

– <http://www.stanford.edu/group/lawlibrary/cgi-bin/iaole/wordpress/>

- **IBA Bar Issues Commission,**

http://www.ibanet.org/barassociations/bar_associations_home.aspx



To Read More About It ...

Richard Susskind, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (Oxford 2008)

Ray Worthy Campbell, *Rethinking Regulation And Innovation in The U.S. Legal Services Market*, 9 N.Y.U. J.L. & Bus. 1 (Fall 2012)

Laurel S. Terry, “*Creative Destruction*” and the Legal Services & Legal Education Markets, JOTWELL (June 5, 2013),

http://legalpro.jotwell.com/creative-destruction-and-the-legal-services-legal-educationmarkets/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A-Jotwell+%28Jotwell%29



To Read More About It...by Laurel Terry

- **NOTE:** Most of my articles and presentations are available online here:

<http://www.personal.psu.edu/faculty/l/s/lst3/>

> **Global Developments in general** (See 1-11, 9-09 and 11-08) (See also 2008 Service Providers article, "The Legal World is Flat", and other "Global Legal Practice" :)

To read my law review articles (or testimony) on the topics listed below, please visit my "Publications By Topic" section of my webpage

- > **Alternative Business Structure (ABS)** developments (including the UK's Legal Services Act 2007, Australia's publicly traded law firms, EU, and OECD developments)
- > **Antitrust initiatives** directed towards the legal profession, including the EU's Professional Services Competition Initiative (See 5-08, 4-08)
- > **the APEC Legal Services Initiative** (See 10-09)
- > **Australian Legal Profession Developments** (See 8-08, 5-09)
- > **the Bologna Process** (See 3-06, 1-05; see also 1-11)
- > **Classification Systems for Counting Legal Services** (See 10-04; 4-07)

A Screenshot of my Presentations Webpage ↑

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WHO regulates?	Self-regulation? Co-regulation? Other? <ul style="list-style-type: none"> • The Troika? • The WTO? • Financial Action Task Force (FATF)
WHAT is regulated?	Providers or Services? Entities and/or individuals?
WHEN to regulate?	Prospectively or Retroactively?
WHERE to regulate?	Geography v. technology mismatch
WHY regulate?	The "Regulatory Objectives" Movement
HOW to regulate?	Outcomes based regulation? Antitrust & regulatory reform initiatives

See Laurel S. Terry, Steve Mark, Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 Fordham L. Rev. 2661 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2058701