

Access to Academics: Making Academics Work For You



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Professor David L Callies looks at the divide between the worlds of academia and legal practice; and at ways to bridge across it.

Law teachers teach. Practising lawyers practise. While these basic labour distinctions continue to characterise the academic and the practitioner, crossovers are increasingly common. The practitioner who gives the occasional law school lecture or who teaches a course as an adjunct professor is common enough, as the catalogue of many law schools in North America, Australia, New Zealand and parts of Europe and Asia clearly demonstrate. Not perhaps as obvious or visible is the number of academics consulting or practising law with established law firms in these same countries. Whether the relationship is short or long-term, formal or informal, the academic working with or for the practising lawyer is an increasingly common phenomenon. The programme of the Academics' Forum at the recent SBL SGP Biennial Conference in Delhi in November, entitled 'Access to Academics: Making Academics Work For You', explored the nature of this relationship, its benefits and pitfalls to each side. Two professors¹ and two international law firm representatives² shared their experiences in various consultancy and 'of counsel' relationships, exploring the motives for the relationship, what worked, and what didn't. What follows is a summary and digest of that session, supplemented with materials supplied by the participants and their respective firms and schools.

What academics do

Academics perform a variety of roles for the practising lawyer. These are principally as follows: advocate, researcher, drafter (memoranda, opinion letters, laws, briefs) expert witness, and continuing legal educator. As appears below, in all of these the academic may have a range of participation in the actual practice of law with various degrees of client contact. The academic hired for his or her previous experience with that firm may well be expected to continue meetings with established clients with whom the academic has had a strong professional relationship. On the other hand, the academic may have no such client contact at all, but work with the practising lawyer purely as a resource. Of course, the type of task which the academic performs may establish that relationship.

The academic as advocate acts in a fashion most like the practitioner for whom the academic works. In this role, the academic writes or helps to write briefs, memoranda and other papers to be filed in court. Indeed, the academic may well actually argue the appeal (or, in rare instances, try or help try the case, as Professor Michael Tigar of the University of

Texas Law School does presently in the Oklahoma City federal building bombing trial of Terry Nichols). As an advocate, it is difficult to act without meeting the client of the engaging law firm. While it is certainly possible to prepare appellate briefs and argument from the record of the proceedings in the court or agency below, it is useful if not essential to gather some materials directly from the client.

The academic who prepares a memorandum of law or a letter of opinion on a particular point or points of law based on a restricted set of facts, on the other hand, is unlikely to need a meeting with a client. It is in this role that many academics are retained either on a continuing or one-off basis. Regular immersion in a particular subject in which the academic is a recognised expert, together with comparatively more time to engage in this type of writing and research, makes the academic a good source of law applied to a particular problem. This is not to say that a good paralegal or associate lawyer is not capable of the same research, but it may take more time than is likely to be spent by the experienced academic. Further, as appears below, it may well be that there is an advantage to having the opinion come from a recognised expert in the field. The work product, whether memorandum or letter of opinion, is usually addressed to a supervising practising attorney rather than to the lawyer's client. As a rule, the memorandum is more thorough and replete with citations to relevant authorities than the letter of opinion.

The academic as expert witness is perhaps equally common, though the law academic as such a witness is not. Nevertheless, as the practise of law becomes increasingly specialised and the subjects more arcane, the expert academic is increasingly called upon to opine about such matters as the highest and best use of land under a town planning or zoning scheme for purposes of compulsory purchase (eminent domain), whether the decisions of the local authority respecting town planning and other matters are reasonable, not arbitrary or capricious, and, in the event of malpractice suits, to what kinds of concepts or materials a law school graduate would have been exposed, and consequently what such a graduate knew or should have known as background for giving advice.

The academic may also simply be retained as an expert, possibly senior, counsellor in areas such as tax, intellectual property and labour law, particularly if the relationship is continuous. In this role, the academic may or may not have contact with a firm's clients in order to advise on particular problems. It may be that the firm's attorneys simply

wish on a regular basis to 'run a problem by' the academic. In such relationships, the academic may spend a fixed time per week or per month in the offices of the engaging law firm so as to be readily available for such counselling, with agreements as to further accessibility by telephone or by e-mail.

Lastly, the academic may serve the practitioner as a private source of continuing legal education. In this role, the academic gives seminars and lectures in specialised areas of law, or organises such presentations by others. Such a role may extend to participation in the selection of materials for firm law libraries and other databases. Indeed, in at least one instance, the firm of Baker and MacKenzie reports that an academic hired principally to help with CLE has since proven to be such a valued resource to the firm that he has for all practical purposes become a major firm manager with a seat on the firm's executive committee.

What's in it for both sides

There are any number of reasons why a practice or consultancy with a firm or government office is attractive to an academic. Of course, there is the financial incentive. Most academics earn far less than their practising counterparts and the need to supplement is keenly felt as the differences widen perceptibly as careers advance. Whereas starting salaries after law school graduation may be comparable (eg, \$45,000-\$95,000 for an associate lawyer with a good academic record joining a firm in North America, and \$50,000-\$70,000 for a comparable academic position as assistant professor), by mid-career the difference is substantial (\$150,000-\$300,000 for a middle range partner, \$95,000-\$140,000 for a full professor of law) and at the height of earning power, the chasm is large indeed (\$125,000-\$175,000 for a professor with an endowed chair, \$250,000-\$700,000 for a senior partner). Many academics choose to supplement their academic salaries through practice, and many of these do so most conveniently and successfully by associating themselves with a law firm and/or undertaking 'consultant' tasks with government agencies or large corporations.

Money is not by any means the sole rationale for such practice associations. While the clinical or trial advocacy instructor may well keep at the forefront of practice issues associated with his or her subject, the average academic often does not. Indeed, there has been substantial criticism over the past 10 years concerning the perceived gap between what academics teach (and therefore, presumably, what

they research, write about and know) and what the practise of law is all about. Outside practise and consultancy work keeps the academic attuned to the more practical and focused aspects of his or her subject, often sharpening, regaining, or gaining anew, practice skills that invariably enrich the classroom experience. Both Professors Callies and Tahmindjis reported changing course syllabi by adding or deleting lecture subjects, formulating examination questions and directed research/writing topics, and writing articles based upon consultant and practice work, to say nothing of the unending source of examples (being careful, of course, to preserve confidentiality of sources and subjects) all as a result of their outside work. There is, in addition, the improvement of classroom method beyond the lecture, such as question and answer or socratic dialogue, which is much enhanced by appellate advocacy and expert witness work conducted outside the law school.

Finally, there is the benefit of improved relationships with the practising bar. Not only is this enriching on a personal and professional level, but it often leads to improved institutional arrangements varying from placement of students upon graduation and selection of adjunct instructors to increased law school/department support and contributions from the practising bar.

The motives of the practising bar are almost exclusively economic. The academic has two things the practising lawyer often does not have: the time to delve deeply into a subject, and a published reputation of expertise to put behind an opinion, brief or argument. Note I say 'published reputation'! There are few experienced practitioners who will concede they know less about their area of specialty than their academic counterpart. In many instances, they may be right, particularly with respect to the practical aspects of the subject. They may, of course, also be wrong. In either event, it is the rare practitioner that has either the time or inclination to write about his or her subject for publication. Such research and writing is, on the other hand, part of the academic's job description (along with teaching and public service). Such expertise can supplement a firm's knowledge about a particular problem and/or, in the event of a formal association like an of-counsel relationship, increase its general reputation in particular areas such as tax, wills and trusts, tort and labour law. What client wouldn't be impressed with a letterhead listing a leading academic in a field important to the client's interest? What judge will fail to pay attention to a leading constitutional scholar who, just incidentally, is a regular faculty

member at judicial workshops and training programmes? Is there a former student who, however grudgingly, will fail to give extra attention to the words of a former professor, either from the bench or bar?

There are, therefore, two economic reasons for the practitioner to retain or associate with the academic. First, the expertise of the academic may justify charging a client a high hourly rate (say, \$300-\$500 per hour) in excess of what the associated academic may receive (say, \$200-\$400 per hour). The law firm will thus 'make money' in the same fashion as it does from its salaried lawyers, whether associates or non-equity (non-participating, salaried) partners: by charging substantially more per hour for their billable time than they will expend for salaries and benefits. Second, the presence of the academic star or superstar may attract clients merely by his or her formal association with the firm. In other words, they become 'rainmakers' just like senior partners (supposedly). This last can take two forms. Either the academic is a former associate or partner with an already-established relationship with a client or clients (which the firm wishes to maintain and protect) or the academic is a rising or arrived star with much visibility due to publications, speeches and the like, whose reputation will draw clients with problems in his or her area of expertise.

Compensation arrangements for academics

The compensation arrangements for academics take two basic forms: per project and per hour. By far the more common approach for the academic 'of-counsel' is hourly compensation. This rate is often dependent upon whether the academic has an ongoing relationship with the engaging law firm, or whether the relationship is dependent upon a particular project. Thus, for example, Kirkland & Ellis of Chicago pays a competitive hourly rate for its 'in house' academics, provides them with office space (non-dedicated, usually), secretarial and other support, and malpractice insurance. The firm may require a minimum number of billable hours per year, and may pay a premium for extraordinary hours or performance. Baker and MacKenzie, on the other hand, pays academics at the same rate as partners, but has few academics as counsel. Those academics brought in for continuing education projects are paid a flat fee for their services, and, as noted above, the firm has in the past brought in and paid an annual salary to an academic to manage in-

house continuing legal education for the entire firm, including all or most of its far-flung offices.

The 'one-off' relationship is somewhat different. While hourly rates are not uncommon (this is the author's experience with the relationship) the project fee, particularly for a brief and/or an appeal of a matter from trial to appellate court, is also common. Thus, for example, an academic may be paid a fee for writing a brief, or a portion of a brief, in an area within his or her particular expertise. Several years ago, an academic in California with a particular expertise in an area of property law typically charged \$50,000 to prepare and file an appellate brief, and a separate fee of thousands more to prepare and argue the matter before an appellate court. The author, on the other hand, has rarely prepared or argued appellate matters on other than an hourly basis. The bill the author prepares is a simple one: a two or three-line statement each month for the duration of the relationship, always addressed to the firm and never to the firm's private clients, such as 'for services rendered during the month of ___ consisting primarily of research, drafting brief, conferences with counsel of record and research assistants, all in connection with *X v Y*: ___ hours @ ___/hour . . . ____'. If research assistants have contributed to the work product, then their time times hours is also listed on the statement of fees, together with any out-of-pocket costs such as photocopying and long-distance telephone charges. It is the author's understanding that such time is billed directly to the client, with no overhead or profit charges, though in at least one appellate matter where the ultimate decision reversed all agencies and courts below, it is the author's understanding that the law firm involved charged a premium to the client for the successful representation.

Compensation for government work is somewhat different, and commonly in accordance with a detailed agreement for services, often having more in common with a procurement contract than with a contract for professional services. The work is generally directly for an agency rather than for a legal department or officer, and for a far lesser amount (the author generally charges government entities something like half to 60 per cent of the rate for private matters). It is more difficult, but not impossible, to charge an hourly rate, and then only with a clearly-defined 'cap' agreed in advance. Billing and reporting requirements are generally more onerous and at least one level of government for decades kept back a percentage of the billed amount until the end of the contract period.

Restrictions on academics: the limits

The academic may be restricted from two directions: the home academic institution and the firm or agency for which the academic performs 'outside' work. First, there are often restrictions on the amount of outside work, if any, which an academic may do. Thus, for example, it is illegal in India for a full-time academic to engage in the practise of law. Many US law schools impose similar restrictions on practice per se, though undertaking research and drafting with direct benefits to governmental agencies, legislators, and so forth, for some form of compensation, is often nevertheless permitted. At the other extreme, some universities specifically permit academics to do 'something else' for so many days or hours a semester, a month, a week, or a term, provided such activities do not demonstrably interfere with teaching, research and writing, and public/professional service, which are the principal duties of the academic. There is, of course, little or no restriction on the academic when he or she is 'off-duty' during the long interim between terms. Thus, for example, many if not most US law professors are free to do whatever they like with their summers (some teach, some do writing and research, some consult – and all continue to grade exams and prepare for next year's classes, whether 'on duty' or not). How such restrictions are enforced is not altogether clear. US law deans are generally powerful administrators with the unbridled authority to increase or decrease class loads, allocate money for research and travel, and schedule classes. A recalcitrant law professor may well find himself or herself teaching uniformly at the beginning and end of the day, in unpreferred subjects, and without travel and research money. In extreme cases, dereliction of teaching duties could conceivably lead to the commencement of termination actions.

Restrictions on the academic imposed by the law firm are generally contained in the letter or contract of engagement. Naturally, confidentiality concerning the matter upon which an academic works is essential and generally clearly expressed. Kirkland & Ellis specifically prohibits any other of-counsel relationship during the period of the consultancy with Kirkland, as well as any other relationship adverse to any Kirkland client. Afterward, the academic is prohibited from making use of any confidential material to which he or she had access that would be adverse to Kirkland or its clients, nor may the academic undertake any other

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International Bar Association

Conferences and Seminars

1998

2 October Fiesole, Italy
2nd Annual Competition Seminar

Antitrust and Trade Law Committee (SBL Committee C)

21-23 October Marbella, Spain
International Hotels, Resorts and Tourism Seminar

Real Estate Law Committee (SGP Committee 1) Travel, Tourism and Hospitality Law Committee (SBL Committee Y), in conjunction with the American Bar Association Real Property, Probate and Trust Law Section, and the Inter-Pacific Bar Association

4-7 November Shanghai, China
2nd Asia Pacific Financial Law Seminar

Asia Pacific Forum in conjunction with the All China Lawyers Association (ACLA), and the Shanghai Bar Association. With the support of the Banking Law Committee (SBL Committee E), Issues and Trading in Securities Committee (SBL Committee Q), and Insolvency and Creditors' Rights Committee (SBL Committee J)

5-6 November Dublin, Ireland
What's New in Law Firm Management: People, Financing and Technology Issues Today

Practice Management and Technology Committee (SGP Committee 10) with the Corporate Counsel Committee (SBL Committee Cc) and the SBL Standing Committee on International Legal Practice, in association with the Law Practice Management Section of the American Bar Association

13 November Düsseldorf, Germany
2nd International Arbitration Day Seminar

Dispute Resolution in International Long-term Construction and Infrastructure Projects Arbitration and ADR Committee (SBL Committee D), with the International Court of Arbitration (ICC), the London Court of International Arbitration (LCIA), and the German Institute of Arbitration (DIS)

30 November - 2 December Kuala Lumpur, Malaysia

Maritime Law Seminar

Maritime and Transport Law Committee (SBL Committee A), with the Inter-Pacific Bar Association

3-4 December Paris, France
Current Issues in Joint Ventures

Business Organisations Committee (SBL Committee G) in association with the-Union Internationale des Avocats (UIA)

(SBL)
Section on
Business Law

(SGP)
Section on
General Practice

(SERL)
Section on Energy
& Natural
Resources Law

1999

15-17 February London, England
5th Annual International Wealth Transfer Techniques Seminar

Individual Tax and Estate Planning, Wills, Trusts, and Succession Committee (SGP Committee 5), Civil Litigation Committee (SGP Committee 12), and Closely Held and Growing Business Enterprises Committee (SGP Committee 22)

February* Denver, USA
Mineral Law Seminar

SERL in association with the Rocky Mountain Mineral Law Foundation

5 March Zurich, Switzerland
Challenges of Cyber Law for Agency, Distribution and Franchising Agreements Seminar

Intellectual Property and Entertainment Committee (SBL Committee L), International Sales and Related Commercial Transaction Committee (SBL Committee M), Taxes Committee (SBL Committee N), International Computer and Technology Law Committee (SBL Committee R), International Franchising Committee (SBL Committee X), and Corporate Counsel Committee (SBL Committee Cc)

11-12 March Washington DC, USA
Electricity Law Seminar

SERL

11-12 March Wellington, New Zealand

What's New in Law Firm Management

Practice Management and Technology Committee (SGP Committee 10)

22-24 March Manila, Philippines
Asia Pacific Regional Conference

Asia Pacific Forum

7-10 April Accra, Ghana
African Regional Conference Practising Law in the 21st Century - Meeting the Challenges

SGP jointly with the General Professional Programme Committee, the IBA Human Rights Institute, and the SBL Professional Development Committee

14-16 April Washington DC, USA
SBL Project Finance Seminar

Committees of the SBL

22-23 April Istanbul, Turkey
Energy Issues for the Millennium Seminar

SERL

22-23 April Caracas, Venezuela
2nd South American Regional Conference

SGP and the SBL Latin American and Caribbean Steering Group

2-5 May Hamilton, Bermuda
10th Annual Seminar on Globalisation of Mutual Funds

Investment Companies and Mutual Funds Committee (SBL Committee I) in conjunction with the Investment Company Institute (ICI)

6-8 May Budapest, Hungary
European Environmental Law Seminar

European Community Environmental Law Subcommittee (SBL Subcommittee F1)

17-20 May Prague, Czech Republic
Eastern European Regional Conference

Eastern European Forum

19-21 May Dublin, Ireland
16th Annual Seminar on International Financial Law

Banking Law Committee (SBL Committee E) and Issues and Trading in Securities Committee (SBL Committee Q)

1-4 June Boston, USA
SGP 1999 Conference

All Committees of the SGP

26 September-1 October Barcelona, Spain
SBL 1999 Conference

All Committees of the SBL

* To be confirmed

For further information on any of these Conferences and Seminars, please contact:

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