

Ending our conflicts of interest to protect consumers of legal publication

By Michael Ginsborg

Law library budgets have lagged far behind escalating costs of print subscriptions to commercial legal publications. Even among other significant causes of budget shortfalls, subscription cost increases have had an especially devastating, cumulative impact. The economic crisis has made matters worse, forcing many of our libraries to reduce budgets that already have far less purchasing power. Unfair business practices of legal publishers also continue to add unknown costs to our subscriptions. To address these issues—and advance a vital public interest—we must reinvigorate our consumer advocacy, starting with ethical reforms.

We have an important precedent for this undertaking. Raymond Taylor, a law librarian and member of the Committee on Relations with Publishers and Dealers, inspired a consumer-protection movement. In his 1969 *American Bar Association (ABA) Journal* article, “Law Book Consumers Need Protection,” he described how legal publishers inflated customer costs for increased profit through deceptive advertising and other unfair practices. His article ultimately led the Federal Trade Commission (FTC), with the ABA’s support, to adopt *Guides on the Law Book Industry* in 1975. If legal publishers did not comply, the FTC could enforce “the requirements of the law” that the guides explained. Violators also faced a risk of class action lawsuits. The FTC rescinded them in 2000—over AALL’s objections—as it also rescinded other industry guides.

Yet legal print costs have continued to outpace inflation due to mergers and acquisitions among legal publishers. The 1996 and 2004 *AALL Price Indexes for Legal Publications* show that costs of all types of supplemented legal publications increased five times faster than inflation between 1973 and 1996, and costs of supplemented treatises increased two and a half times faster than inflation between 1998 and 2004. In AALL-sponsored research, economist Mark McCabe identified the “post-merger impact” four years after Thomson’s 1996 purchase of West Publishing. Prices of Thomson treatises and encyclopedias increased by 40 percent, and the acquired West titles increased by 23 percent.

Even in this economy, the three largest legal publishers—Thomson, Reed-Elsevier, and Wolters Kluwer—have no incentive to permanently or significantly reduce the rate of cost increases, and they have ample market power to sustain or accelerate them. According to the 2009 *Market Share Reporter*, they controlled 85 percent of North America’s legal publishing market, valued at \$4.4 billion, in 2007. Other publishers, such as BNA, sell titles that we cannot substitute for “Big Three” titles, so they can also charge a premium.

Escalating costs harm not only those we serve but also a larger public interest that depends on stronger consumer advocacy than we have tried. If successful, secondary legal publications do more than reward their authors and corporate owners. Lawyers, judges, and *pro se* litigants use them as aids to finding and understanding the law. Yet a gap continues to grow between those who can and cannot afford them. Making them more affordable widens public access, spreading the benefits of legal knowledge throughout the legal system. So we would advance not just the collective interest of our libraries but also the public interest if we expanded our consumer advocacy beyond the mission of the Committee on Relations with Information Vendors and AALL’s *Guide to Fair Business Practices for Legal Publishers*. Working together, we should pressure legal publishers to end unfair business practices and steep increases in purchase prices and supplementation costs.

Our collective effort in a \$4.4 billion market could make a difference, especially if we also engaged the largest share of consumers—attorneys. And we have effective options short of a boycott or other antitrust violation. For example, we could undertake mass education of attorneys on how exorbitant costs undermine the critical public value of commercial legal publications; seek renewed FTC guides for full and transparent disclosure of all ranges of subscription discounts and criteria for discounts; set up a website for reporting and tracking consumer complaints; forge alliances with national, state, and local bars and legal advocacy groups; and launch joint investigations of legal publishing practices as warranted by complaint trends.

We have missed the mark in our current efforts at consumer advocacy, however, because we follow the wrong model for our business relations with publishers. Legal publishers divide us against one another as we try to negotiate less onerous print subscription costs for our respective employers. We accept this situation under the guise of “partnerships.” As suggested in a February 2009 *Spectrum* article, “Happy Together,” we should individually “partner” with legal publishers to secure, as best we can, our separate interests.

But partners should not have opposing economic interests, as legal publishers and law libraries do. Partners also agree to share all information they need to pursue their respective interests, but legal publishers violate this condition by often requiring non-disclosure clauses in contracts with their customers. At any rate, we need real partners. We could benefit our individual employers more by partnering with consumers than by trying to gain exclusive, short-term advantages from legal publishers. Over the long term, we would gain more for our respective employers by advancing our collective interest and the public interest.

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Related Resources

Vendor Sponsorships and Related AALL Financial Data, 2005-2009

www.aallnet.org/products/pub_sp1012/pub-sp1012-PointData.pdf

“Law Serials Pricing and Mergers: A Portfolio Approach”

Mark J. McCabe

The Berkely Electronic Journal of Economic Analysis and Policy
<http://tinyurl.com/McCabeStudy>

AALL Sponsorship Opportunities

www.aallnet.org/services/sponsor_options.pdf.

“Happy Together”

Devin GawneMark and Sarah Nichols

February 2009 *Spectrum*

www.aallnet.org/products/pub_sp0902/pub_sp0902_Happy.pdf

AALL Ethical Principles, approved by the AALL membership on April 5, 1999

www.aallnet.org/about/policy_ethics.asp

“Revising a Code of Ethics”

Ralph A. Monaco

November 1997 *Spectrum*

www.aallnet.org/products/pub_sp9711/pub_sp9711_Revision.pdf

March and April 1996 AALL President’s Newsletters (on HeinOnline)

www.aallnet.org/members/heinonline.asp

In fact, by treating publishers as partners, we mask our collective conflicts of interest with them. After all, partners should not have conflicts of interest. But as customers in an oligopoly market, we cannot expand our consumer advocacy unless we acknowledge these conflicts. To convince legal publishers that theirs is not a captive market, we need support from our fellow “captives”—the attorneys who bear most of the costs. Attorneys will not support us if they have reason to question our independence when we try to protect our shared consumer interests and the public interest. So we must ask three questions about the consequences of accepting benefits from legal publishers whose business practices undermine consumer interests. First, would fear of losing the benefits hinder our good-faith efforts to protect customers of these legal publishers? Second, would we risk appearing open to influence from these legal publishers in matters affecting their interests? Third, do these legal publishers appear to condition their largesse on a *quid pro quo*? We must ask the questions with the heightened care needed to protect consumers of legal publication and without self-interested rationalizations. If we answer “yes” to any of them, then we have a conflict of interest.

The proposed ethical test requires AALL and chapters to ban cash and non-cash donations from legal publishers with anti-consumer practices. (It also requires us to ban meals, social events, ads, and exhibits by these publishers in all our professional venues, but I will not explain why here.) Although incomplete and limited to just AALL sponsorships, donation data shows that we must answer “yes” to each of the first two ethical questions. In fiscal years 2007, 2008, and 2009, four legal publishers—including BNA and at least two of the Big Three—contributed an average of \$333,815, or 96 percent, of all vendor donations to AALL. Total vendor donations over those three years averaged \$346,984, or 9 percent, of AALL’s total average revenue of \$3,720,604. (See “Related Resources” for a link to a more detailed financial summary.)

We also have a *quid pro quo* with legal publishers donating the largest amounts. What benefits do they receive for their donations? According to AALL’s 2010 “Sponsorship Opportunities” brochure, sponsors at increasing donation levels gain increasing advantages to “target” attendees of AALL Annual Meetings.

At a March 1996 meeting, AALL’s Executive Board decided to remain neutral on a pending merger between West and Thomson Legal Publishing, despite concerns about increased costs to law libraries. Thomson appears not only to have tried to influence the board, but also to have involved AALL in a *quid pro quo*. Lawyers Cooperative executive Jim Briggs asked AALL President Patrick Kehoe if he and Thomson CEO Brian Hall could meet with the board to discuss the merger. Kehoe consulted several board members, and they responded favorably. The night before its meeting, the board had a four-hour “working dinner” with these two invited “guests.” Neither Hall nor Briggs attended the board’s meeting. Just a few months earlier, Hall and AALL’s executive director helped establish the Thomson Professional Education Series for AALL members.

Kehoe recognized that “some law librarians” had “legitimate questions” about our independence. But AALL did nothing to address the importance of consumer advocacy and a commensurate duty to avoid conflicts of interest. Indeed, we did something worse. In 1999, when we replaced our Ethics Code with Ethical Principles, we removed a consumer advocacy principle:

Law librarians...have a duty to society and the legal profession to work both individually and through their professional organizations toward improving the quality and minimizing the cost of the library component of the delivery of legal services.

To become stronger consumer advocates, we must restore consumer advocacy to our ethics, end our conflicts of interest, invite attorneys to join us as associate members, and, if necessary, amend AALL and chapter bylaws. We must be prepared to forgo *all* donations from specific publishers as we remake national and local organizations worthy of alternative donations from attorneys. Otherwise, we will continue to compromise ourselves, our constituents, our employers, and an important public interest. ■

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