

Popular Threads on Solosez

Is It Ethical for a Bar Association to Charge for Access to its Ethics Opinions?

I wanted to take another look at an ABA ethics opinion from last August about the use of contract lawyers. Since I wrote a blog post about the opinion at the time it was issued, I figured I would just go back to that post and follow the link to the opinion.

Since the ABA made the opinion freely available within days of its issuance, I was surprised when my attempt to access it through the link from my site ended up in a 404 page error. Further poking around on the ABA's website reveals that the opinion is apparently now considered "premium" content.

According to this page: <http://www.abanet.org/cpr/pubs/ethicopinions.html>, non-members of the ABA can purchase copies of ethics opinions; ABA members get "complimentary" access to opinions issued within the past year; and members of the Center for Professional Responsibility (it costs \$100 to join) get free access to opinions issued since 1984. Opinions cost \$20 apiece.

[I note that, the ABA's website states: "The material in all ABA publications is copyrighted and may be reprinted and/or reproduced by permission only." Nevertheless, the opinion I'm interested in is posted in full on at least two other websites (<http://www.docstoc.com/docs/1081365/ABA-Ethics-Opinion---Outsourcing> and <http://www.aapipara.org/File/ABA/ABA%20Outsourcing%20Opinion.pdf>). Neither document indicates that it has been reprinted with permission.]

I understand that the ABA is a voluntary organization, and it certainly has the right to charge for membership. However, the Center for Professional Responsibility plays almost a quasi-governmental role when it issues ethics opinions, since those opinions, though technically not binding on any state disciplinary body, are accorded great weight by such bodies when they interpret similar (and frequently identical) state disciplinary rules.

So, ethics gurus, is it ethical for a voluntary bar association to charge for access to its ethics opinions?

Lisa Solomon, New York

I guess my question is, how is this different from a state allowing West or Lexis to charge for a statute book or the case reporters? F.2d isn't free. And if I want it "free," I have to go to a library (that paid for it).

Haven't really thought it through all the way, but that's my initial gut reaction. But then, if the ABA is charging, I can't go ahead and read the ethics opinions to help form my own...

Dineen Pashoukos Wasylik

I think it is a commercial question--not ethics. They may do so at the risk of being marginalized in their leadership role.

John Page, Florida

Can't you make a constitutional argument on due process (notice) grounds because attorneys are being held to legal standards that aren't made freely accessible to the lawyer public?

Kind of like how a State has to print and publish a statute and make it available in order to hold people to it.

Kimberly L. Alderman

I'm no ethics guru, but I don't think this makes any sense in light of the role that ABA opinions have in many states. Do I have your permission to forward your e-mail to folks at ABA for their response?

Sharon D. Nelson, Virginia

Certainly!

Lisa Solomon

I'm not sure who has responsibility in the ABA for this decision, but I sent it to some of the higher-ups who should be able to direct it to the right person. I'll let everyone know if I hear back.. .

Sharon D. Nelson, Virginia

I got immediate responses from my contacts at the ABA who promptly delivered your message to the heads of the ABA Center for Professional Responsibility. We'll see what they have to say.

Sharon D. Nelson, Virginia

This is a really interesting arguments and not without some precedent. A similar argument was made in a copyright case that I followed for a while, *Veeck v. Souther BuildingCode congress* (5th Cir. 2002).

In that case, Southern Building Code developed and published different standards, which several municipalities later adopted as the law. Veeck purchased the code on disk and posted it on his website, and SBC sued him for copyright violations. Veeck argued that the codes lost copyright protection when they were incorporated into public law and further, made the point similar to yours that due process required public access to laws. I don't think the court addressed the due process arguments, but an en banc panel found for Veeck and held that standards adopted into law lose their copyright protection.

Perhaps I can do the same thing here - buy a copy of the ABA Ethics Rules on Disk and publish them at my website. For lawyers, ethics codes certainly have the force of a statute.

Carolyn Elefant, Washington, D.C.

Actually, the text of the Model Rules is freely available online (http://www.abanet.org/cpr/mrpc/model_rules.html), but the ethics opinions aren't. Does this change your analysis?

Lisa Solomon

I think there is even a stronger argument for the opinions to be online because it's the interpretation of the

rules that have the force of "law" for lawyers. For example, there's nothing in any code of rules that says "Lawyers can't join BNI," but several ethics decisions make that very clear. Same is true for much of your contract lawyer analysis.

Carolyn Elefant

OK, look guys, you got two different questions: One is, is it ethical/legal and the other is, is it a good idea.

The ABA is not a mandatory bar. No one has to belong to them, and in fact, they have absolutely no discipline power. IF it was a mandatory bar, such as the Florida Bar, which had the power to actually discipline an attorney, then I would think that there would be a very good argument for making this stuff available at least to members; and in fact the Florida Bar does make it available on the web; though they don't just limit it to members. On the other hand, I was looking for an opinion the other day from an out of state bar, I *believe* it was from Delaware, but it could have been someone else (Maryland? Maybe) and they had their opinions on the web and but limited access to those people who were actually members of the bar. Fine. They use their money and dues to create the opinion, they can limit access to it. But the ABA clearly has no disciplinary authority and their opinions, and in fact, even the model code of professional responsibility, is only advisory. They can make the stuff freely available to all, restrict access to members, give restricted access to some opinions to some, and none to others, or they can say you need to spend your money if you want access to this; we spent our money and if you want access to this stuff, which is our copyright, then you need to do X, Y, or Z. I'm not seeing where they have any legal or ethical duty to make the stuff available for free to everyone who wants access. So long as there is some way to access it (Join the club; buy the publication, or travel to law library) then they're perfectly within their rights.

Now, is it a good idea? I don't know. It depends on what they want to accomplish. On the one hand, they spend a lot of time and money developing the model code of professional responsibility and issuing these opinions on them. They don't do this in a vacuum; I suspect that they hope and expect that the model codes and the logic behind the opinions will be adopted by various mandatory state bars. I mean, why else spend the time and money. And, clearly, the ABA likes to think of itself and to present itself as representing lawyers in this country. That's why they issue grades for federal judicial nominees; that's why they take stances on legal issues; they are more or less presenting themselves as the leading bar organization in the country and want to be taken seriously as such. Their opinion/pronouncement carries weight with at least certain members of the public.

Now, with respect to the opinions themselves, first, I suspect that those members of the mandatory bar that are responsible for writing, updating, and issuing opinions on the various state bar rules already have access, one way or another, to the ABA opinions. It'd be nice if they made it freely available, but I'm not seeing where they have any legal or ethical obligation to do so; but if they don't I do think it kind of undercuts any claim they have to speaking for the profession.

Ronald Jones, Florida