



BOJI TOWER, GROUND FLOOR
124 W. ALLEGAN STREET
P.O. BOX 30036
LANSING, MICHIGAN 48909-7536

TELEPHONE:
(517) 373-3330
FAX NUMBER:
(517) 373-0550

MEMORANDUM

TO: Senator Michael D. Bishop
FROM: Kimberly Mlinaz, Law Clerk
RE: Newspaper -- Notice Requirements
DATE: April 30, 2009

Question Presented

Whether the notice requirement of publication in a "newspaper of general circulation" can be satisfied by publication on the Internet if no qualifying newspaper is available in the community.

Applicable State Law

MCLA § 600.1461(1) & (2):

- (1) The term "newspaper" as used in the revised judicature act of 1961 shall be construed to refer only to a newspaper published in the English language for the dissemination of local or transmitted news and intelligence of a general character or for the dissemination of legal news, which
 - (a) has a bona fide list of paying subscribers or has been published at not less than weekly intervals in the same community without interruption for at least 2 years,
 - (b) has been established, published, and circulated at not less than weekly intervals without interruption for at least 1 year in the county where the court is situated...
 - (c) annually averages at least 25% news and editorial content per issue...
- (2) If no newspaper so qualifies in the county where the court is situated, the term "newspaper" shall include any newspaper in an adjoining county which by this section is qualified to publish notice of actions commenced therein.

MCLA § 600.1950(1) & (2):

- (1) The term "newspaper" is limited to a newspaper published in the English language for the dissemination of local or transmitted news and intelligence of a general character or for the dissemination of legal news, which has a bona fide list of paying subscribers or has been published at not less than weekly intervals in the same community without interruption for at least 2 years, and has been established, published, and circulated at not less than weekly intervals without interruption for at least 1 year in the county where the court is situated.

- (2) If no newspaper so qualifies in the county where the court is situated, the term "newspaper" shall include any newspaper in an adjoining county which by this section is qualified to publish notice of actions commenced therein.

MCLA § 691.1051(1)(a), (b), & (c):

- (1) The term "newspaper" as used in any statute of this state, except the revised judicature act of 1961 relative to the publication of a notice of any kind, shall be construed to refer only to a newspaper published in the English language for the dissemination of local or transmitted news and intelligence of a general character or for the dissemination of legal news, which
 - (a) has a bona fide list of paying subscribers or has been published at not less than weekly intervals in the same community without interruption for at least 2 years, and
 - (b) has been published and of general circulation at not less than weekly intervals without interruption for at least 1 year in the county, township, city, village or district where the notice is required to be published...
 - (c) annually averages at least 25% news and editorial content per issue...

If no newspaper so qualifies in the county where the court is situated, the term "newspaper" shall include any newspaper in an adjoining county which by this act is qualified to publish notice of actions commenced therein.

Summary

A multitude of Michigan statutes, ranging from public hearing notice to complex bid procedures, refer to the publication of notice in a "newspaper of general circulation." To ensure sufficient notice is given to the public, three key statutory provisions carefully define the term "newspaper." Changes in the media landscape, including the closure of some printed publications in Michigan, have spurred an investigation into how public notice will be accomplished in the digital age.

Qualified newspapers meet a three-prong test: (1) they are published in English for the purpose of distributing news; (2) they must have a bona fide list of paying subscribers or a minimum two-year history of uninterrupted weekly circulation; and (3) they have been uninterruptedly published at least weekly for a minimum of one year. If a locality does not have a qualified newspaper, the statutes require them to use a qualified newspaper in an adjacent county. While the Michigan Attorney General opined that "publish" does not mean "print," the printed content requirement may provide a significant barrier to digital qualification.

The underlying tenant at work in creating these qualifications is the Supreme Court ruling that required public notice be reasonably calculated to reach the right people. The Michigan Supreme Court ruled that this balancing test must recognize theoretical and economic factors when characterizing the government's burden of notification. Any determination on sufficient notice is fact driven and, in this case, must balance the economic implications of regional newspapers or local Web sites with concerns including data reliability, Web site stability, and potential access concerns for the elderly and the poor.

Many states have already begun to explore digital alternatives for public notice requirements with mixed results. Florida is currently exploring legislation that would formalize digital reporting requirements. Conversely, the Wisconsin Attorney General explicitly stated that digital notification will not suffice when a statute requires publishing in a newspaper.

In the short term, the clear statutory alternative for communities losing their printed media is to print

notification in the next closest qualified newspaper. As the impact of this information shift begins to impact communities, challenges will likely occur as to the sufficiency of notice -- how can a notice printed in a city's newspaper be reasonably calculated to reach the residents of a different city? While digital options may provide the most economical alternative, the Public Notice Resource Center argues that steps must be taken to ensure public awareness and the preservation of the public record.

Analysis

I. Statutory Requirements for notice in a "newspaper of general circulation."

The question that you have posed involves the statutory requirements that qualify a newspaper as a "newspaper of general circulation." There are three main elements common to all three of the defining statutory provisions: (1) the newspaper must be published in English for the purpose of distributing news; (2) it must establish its significance by having a "bona fide list of paying subscribers" or through a minimum two-year history of uninterrupted weekly circulation; and (3) "[have] been published and of general circulation at not less than weekly intervals without interruption for at least 1 year . . . where the notice is required to be published." MCLA § 691.1051. The two civil definitions contain an additional content requirement of "at least 25% news and editorial content per issue." MCLA § 691.1051; MCLA § 600.1461.

The statutes explicitly provide an alternative if a qualified newspaper cannot be located in the place notice is required. All of the statutes indicate that "[i]f no newspaper so qualifies in the county where the court is situated, the term "newspaper" shall include any newspaper in an adjoining county which by this section is qualified to publish notice of actions commenced therein." MCLA § 600.1461. In *Drabinski v Brown*, 296 Mich 463, 469 (1941), the Michigan Supreme Court held that the newspaper does not have to be printed in that place to be sufficient for publication of public notice.

The statutes in question require that the newspaper be published. The Michigan Attorney General has clearly made a distinction between the word "publish" and the term "print." 4891 Op. Att'y Gen. 177 (1975). In that opinion, "the term 'publish' . . . refers to the act of making information known to the general public, as distinguished from the term 'print' which properly refers to the mechanical process whereby the impression of words are stamped upon paper." *Id.* This would seem to provide at least some possibility for using a digital newspaper that meets all of the other circulation requirements; however, there are some potential problems that could arise in using a digital format.

In addition to public policy concerns regarding Internet access and readership, there are legal concerns that would have to be addressed before a digital format could be used. First, the legal precedent used by the Michigan Attorney General in the referenced opinion is derived from a Michigan Supreme Court case that presumed printing of a newspaper was a necessary prerequisite to publishing it. *Hinchman v Barns*, 21 Mich 556 (1870). Moreover, the statutory definition for the content requirement refers to any "*printed* matter other than advertising." MCLA § 600.1461 (emphasis added).

Many notification requirements enumerating a "newspaper of general circulation" rely on these statutory definitions to ensure that their notice is adequate. In the absence of a qualified local newspaper, a qualified newspaper from an adjacent location is the required substitution. Digital alternatives will likely struggle to meet the statutory definition because many will not be published

specifically for news purposes. Even digital news sources could meet opposition because the content requirement is specifically defined by its *printed* matter.

II. Concerns regarding adequacy of notice if published in an adjoining county.

Under *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 318 (1950), the seminal Supreme Court decision regarding sufficient notice, "notice must be such as is reasonably calculated to reach interested parties." The Michigan Supreme Court construed this holding to mean that "the kind of notice required depends on the circumstances of the case and the availability of other means in both a theoretical and economic sense." *Alan v Wayne County*, 388 Mich 210, 351 (1972). It would seem that sufficient notice must be conceived through a balance of citizens' rights and governmental burden. *Id.*

Two Michigan cases challenged the adequacy of publication as sufficient notice where each plaintiff resided in a different community than where the notification was published. In *Moss v Keary*, 231 Mich 295, 300 (1925), a Detroit resident challenged the printing of an official notice in the small newspaper of Springwells, a village outside of Detroit. Despite being the youngest paper in Wayne County publishing legal notices, the court reasoned that the newspaper was sufficient because several Detroit attorneys used the paper, Wayne County Circuit Judges had ordered publication with it, and it had a circulation equal to the *Detroit Law Journal*. *Id.* In *Harter v Swartz Creek*, 68 Mich App 403, 408 (1976) (on rehearing), a Bloomfield Hills resident who was a taxpayer in Swartz Creek challenged the publication of bond issues in the Swartz Creek News. The court noted that the balancing test was fact driven and held that the "notices were calculated to give reasonable notice to the taxpayers involved."

Notification requirements are not meant to ensure that every individual is personally notified of events that may affect them; rather, they are designed to ensure that a reasonable effort is made to inform the public. *Mullane*, 339 US at 319. The Michigan Supreme Court has recognized that the government may consider "theoretical and economic" concerns when applying this balancing test. *Alan*, 388 Mich at 350. These fact-driven analyses must be conducted with the public's best interest in mind. *Id.* at 351.

Here, the reality facing Michigan cities is that printed newspapers are struggling to keep readership, and some are even being forced to close their doors. In these communities, local governments face the problem of how to ensure that their constituents continue to have access to public notices. Alternatives include posting them in regionalized newspapers or resorting to some type of Web notification. The Michigan Press Association has already begun to develop a list of concerns that could stem from digital publication including Internet access concerns, proving publication, and even preserving the record for future generations. www.michiganpress.org/index/17

At the heart of the notice requirement, particularly for publication, is a reasonable attempt to reach as many individuals as economically possible. Printing notices in newspapers outside of the community creates an access problem that would have a particular impact on the elderly and the poor. Moreover, even though Michigan case law seems to uphold the sufficiency of notification when the individual resides in a different city, the balancing test will likely be swayed in the citizen's favor as the number of citizens impacted by the notification grows. Internet postings have the same types of access problems and add the additional concerns of stability in reporting and recording. Nevertheless, the disappearance of local printed newspapers is a very real challenge facing those communities, and reliance on a digital reporting system or regional periodical may be the only economically feasible alternative available.

III. National trends in digital notice.

The disappearance of printed newspapers and their impact on public notice is not unique to Michigan. Many states have already begun to explore digital alternatives to traditional printed media. In Florida, Senate Bill 2292 (legislation focused on digitizing advertising and notices by government entities) is on hold while they prepare to conduct an effectiveness study this summer. Senator Michael Bennett, Chair for the Florida Senate Committee on Communication Affairs, called for the study and points out that there are many important reasons why public notices should remain printed.

In Connecticut, there is already a requirement that cities with Web sites post twenty-four hour notice of meetings and minutes from public meetings within seven days. This requirement has actually forced several smaller towns to take down their Web sites because they do not want to face legal problems stemming from non-compliance. Many of these local officials point out that they do not have the staff to regularly update the Web site and the time requirements are too burdensome.

Wisconsin, another state that has begun posting some notifications on city Web sites, has faced a different set of concerns. In August 2008, a hacker took down the City of Madison's Web site, casting doubt and concern on the viability of digital communication within the current environment. Earlier that year the Wisconsin Attorney General issued an opinion explicitly stating that Web site notification would not suffice where Wisconsin statutes required newspaper notification.

The use of digital media, at least in some form, seems to be inevitable. Whether the trend is driven by the financial troubles affecting traditional print media or the coming of age of the technology generations, national studies show that more citizens are seeking out digital sources as their primary means of news. Based on these case studies, it is likely that number of states exploring the use of technology for communicating with their constituents will continue to grow.

Conclusion

Technological improvements in communication tools, coupled with the failing economy, are creating opportunities for states to explore what resources are effective when providing important information to their constituents. In Michigan, where publication in a "newspaper of general circulation" is the standard and "newspaper" is strictly defined, communities without a qualified newspaper must seek out the closest qualified newspaper, even if it is in a different county. While Michigan works to satisfy notice requirements, it must balance its economic concerns with its citizens' ability to locate information, Internet access issues, and the stability of digital information. As newspaper readership declines and people rely more heavily upon Internet resources, the state must determine if printed notice remains a viable tool, reasonably calculated to reach its citizens.