



ALAN WILSON
ATTORNEY GENERAL

October 21, 2015

Mr. G. Lee Cole, Jr., Esquire
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Dear Mr. Cole:

You have requested the opinion of this Office as to whether “online newspapers” that exist solely on the internet with no print circulation (hereinafter “online newspaper”) would be considered a newspaper of general circulation as the term is used within statutes and regulations imposing legal notice requirements for various purposes. Based on the analysis below, we do not believe that a court would find that online newspapers constitute newspapers of general circulation.

Law / Analysis

You have listed numerous provisions in the South Carolina Code that provide for publication of legal notices in a newspaper of general circulation. While each statute imposes different requirements based on the purpose of the statute, common to each is that notice be published in a “newspaper of general circulation.” In determining what is meant this term, and whether it is inclusive of an online newspaper, it is necessary to look to the rules of statutory interpretation for guidance. The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

We have issued several opinions commenting generally on what constitutes a “newspaper” as well as a “newspaper of general circulation.” See, e.g., Op. S.C. Att’y Gen., 2005 WL 1609295 (June 30, 2005); Op. S.C. Att’y Gen., 1984 WL 249918 (June 27, 1984). In a 1943 opinion, which has since been reaffirmed, we addressed the definition of the term “newspaper” as it is generally defined for purposes of publication statutes, providing that:

- (a) The paper must be published regularly at short intervals;
- (b) The paper must contain intelligence of current events and news of general interest;
- (c) The paper must be intended for general circulation; however, circulation may be limited to a specific geographical area;
- (d) The paper must be sold or distributed gratis.

Op. S.C. Att’y Gen., at 222 (1943); see also Op. S.C. Att’y Gen., 2005 WL 1609295 (June 30, 2005); Op. S.C. Att’y Gen., 1984 WL 249918 (June 27, 1984) (both analyzing our 1943 opinion). Furthermore, in 1984, we elaborated on our 1943 opinion by commenting on what constitutes a “newspaper of general circulation.” We provided that:

[t]o be characterized as a newspaper of general circulation within a community, a newspaper should contain news of general interest to the community and it must reach a diverse readership Additionally, a newspaper of general circulation has been defined as one that has a content appealing to the general public and having more than a de minimis number of actual paid subscribers.

Op. S.C. Att’y Gen., 1984 WL 249918 (June 27, 1984) (internal citations omitted).

The legislative intent in requiring notice statutes provide notice in a newspaper of general circulation has also been addressed by our Office. See, e.g., Op. S.C. Att’y Gen., 2005 WL 1609295 (June 30, 2005); Op. S.C. Att’y Gen., 1984 WL 249918 (June 27, 1984). Specifically, we have opined that “[t]he legislative intent . . . in the various statutes dealing with notice by publication in a newspaper is to make use of the publication *most likely* to give the notice to the *intended recipient*.” Op. S.C. Att’y Gen., 1984 WL 249918 (June 27, 1984) (emphasis added).

We have no doubt that the terms “newspaper” and “newspaper of general circulation” as defined within our opinions and referenced in the various notice statutes within our State refer to the print copy of a newspaper. See generally Lauren A. Rieders, Old Principles, New Technology, and the Future of Notice in the Newspapers, 38 Hofstra L. Rev. 1009, 1010 (2010) (“Newspapers have traditionally been statutorily selected as the chief tool for disseminating legal notices to the public. In the past, no other easily accessible, inexpensive vehicle for mass communication existed that could serve the dual goals of public notice: (1) to ensure that a notice is given the widest publicity practicable, and (2) to make sure the rights of the concerned are safeguarded”); see also 66 C.J.S. Newspapers § 1 (2015) (“In ordinary understanding a newspaper is a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest”). Nevertheless, in some circumstances it has been determined that “statutes are not confined in application to contemporary instances and that their principles are to be extended to embrace new factual situations and new technological developments.” Smith v. Pan Air Corp., 684 F.2d 1102, 1113 (5th Cir. 1982). However, to extend a statute to embrace new technological developments, any extension must comport with the legislature’s intent in the statute’s enactment. S.C. Rev. Rul. 94-11, 1994 WL 931903 (1994).

In an opinion issued by the Office of the Ohio Attorney General, a similar question of whether an online version of a newspaper of general circulation would be considered a newspaper of general circulation on its own merit. Op. Ohio Att’y Gen., 2008 WL 1952097 (April 30, 2008). Concluding that it would not, the opinion first discussed what is meant by the term “online.” Id. at *2-3. It provided that the word “[o]nline is a general term defined as ‘connected to, served by, or available through a system and esp. a computer or telecommunications system (as the Internet).’ ” Id. at *2 (quoting Merriam-Webster’s Collegiate Dictionary 867 (11th ed. 2007)). Furthermore, it stated that “ ‘information made available by means on the Internet may be accessed and retrieved though the World Wide Web.’ ‘World

Wide Web' means 'a part of the Internet accessed through a graphical interface and containing documents often connected by hyperlinks.' ” Id. at *3 (quoting Merriam-Webster's Collegiate Dictionary 1444 (11th ed. 2007)). Therefore, the opinion provided that “[i]t is through the World Wide Web that one is able to access a web site that contains the version of a newspaper of general circulation.” Id.

The opinion of the Ohio Attorney General also commented on the vast difference between online newspapers, providing that some are free for all users, while others require payment of an online subscription fee or maintenance of an existing subscription to the print edition of the newspaper. Id. The opinion also noted that online newspapers typically present a series of links to various news stories or links to pages of general news topics that then provide links to individual articles while others have the appearance and format very similar to a hard copy, newspaper format. Id. Therefore, it was concluded that “[w]ith the wide range of possibilities for offering newspapers online, the only trait common to all online newspaper editions is their accessibility through the Internet.” Id. Because the statute at issue in the opinion required a newspaper of general circulation to have a second class mailing privilege and a definite price or consideration paid, the Office of the Ohio Attorney General concluded the online newspaper could not be deemed a newspaper of general circulation on its own merits. Id.

In applying the above to your question, the statutes you have cited in your opinion request as examples of notice statutes within our State are helpful to our analysis. In S.C. Code Ann. § 5-37-110 (2004), our legislature set forth the procedures municipalities must follow to make assessments for public improvements, one requirement being public notice. Such section provides in part that:

[i]mmediately after such assessment roll has been completed the governing body . . . shall cause to be published at least once in a newspaper of general circulation *within the municipality* a notice of completion of the assessment roll setting forth a description in general terms of the improvements and providing at least ten days' notice of the time fixed for hearing of objections in respect to such assessments. The time for hearing such objections shall be at least thirty days

S.C. Code Ann. § 5-37-110 (2004) (emphasis added). The statute seeks to provide notice to individuals affected by the assessments to afford the ability to make objections. Therefore, the legislature has required publication in a newspaper of general circulation within the municipality that the assessments are being made.

S.C. Code Ann. § 27-21-22 (Supp. 2014) relates to the procedure for a sale of recovered property, requiring that: “[a]t least ten days prior to the sale, the property must be advertised by publication in a local newspaper of general circulation *where the property will be sold*” (emphasis added). The intent here is to notify the community in the surrounding location of the property of the sale.

S.C. Code Ann. § 59-18-930(B) (Supp. 2014) involves notice of the executive summary of comprehensive annual report card of public schools. It provides that:

[t]he school, in conjunction with the district board, also must *inform the community* of the school's report card by advertising the results in at least one South Carolina daily newspaper of general circulation *in the area*. This notice must be published within forty-five days of receipt of the report cards issued by the State Department of Education and must be a minimum of two columns by ten inches (four and one-half by ten inches) with at least a twenty-four point bold headline.

S.C. Code Ann. § 59-18-930(B) (Supp. 2014). Here, notice is intended to reach the community members who would have interest and concern over the grade the school received on its report card.

While these statutes reflect only some of our State's notice statutes, they are illustrative of the overall intent of the legislature in enacting notice statutes: publication in a newspaper that is most likely to give notice to a distinct group of individuals in a geographic area affected by the actions taking place. As we agree with the opinion of the Ohio Attorney General that the common characteristic of an online newspapers is that they are accessible through the internet, it is our opinion that the directions imposed in each of these statutes – i.e, publication¹ in a newspaper of general circulation “within the municipality,” “where the property will be sold,” and “in the area” of the school – would be meaningless if the definition of a newspaper of general circulation were extended to online newspapers. This is so because any online newspaper across the globe, regardless of its origin or targeted audience, could meet these requirements since an online newspaper can be accessed from any computer worldwide. Therefore, we believe extending the term newspaper of general circulation to online newspapers would conflict with the legislature's intent of providing notice in a newspaper most likely to give notice to the intended participant.

In Courier-Post Newspaper v. County of Camden, 413 N.J.Super. 387-89, 383, 995 A.2d 306, 315 (N.J. Super. Ct. App. Div. 2010), it was similarly concluded that an online version of a newspaper of general circulation in Philadelphia would not meet the requirements of a New Jersey notice statute providing that the newspaper used for notice must be “printed and published” in New Jersey. The Defendant reasoned this qualification was met because the newspaper could be viewed online and printed from a computer in New Jersey. Id. at 387, 995 A.2d at 315. Rejecting this argument, the court stated that:

Defendant's interpretation of the statutory requirement that the newspaper be printed and published in New Jersey would render the restriction virtually meaningless because any newspaper from any part of the globe that is available online could be considered printed and published in New Jersey. The purpose of the advertising statute . . . is to require that legal notices be presented in newspapers “that are read and understood by a cross-section of the community, and have ‘stability and continuous existence in the municipalities where their publication offices are maintained.’ ”

¹ In a prior opinion of this Office, we also noted that “a newspaper may be deemed published in any place where it is circulated.” Op. S.C. Att’y Gen., 1984 WL 249918 (June 27, 1984) (citing Wolf County Liquor Dispensary Ass’n v. Ingram, 272 Ky. 38, 113 S.W.2d 839, 842 (Ky. Ct. App. 1938)).

Id. at 388, 995 A.2d at 315. The Court went on state that:

[d]eeming all online newspapers to meet the requirement of being printed and published in New Jersey would not serve this purpose. Such a result would eliminate the physical connection between the newspaper's operation and the community. This physical connection is significant because a local newspaper is where people will ordinarily go for local news whether online or at the local newsstand. By requiring that newspapers carrying legal notices be printed and published in New Jersey, the Legislature is assuring that the legal notices are published in newspapers where those most likely to be interested in the notices may see them.

Id. While we acknowledge that an online newspaper may possess some of the characteristics of a newspaper and a newspaper of general circulation as we have defined these terms in prior opinions, in line with the reasoning in Courier-Post, we reiterate our belief that extending the definition of a newspaper of general circulation to include online newspapers would defeat the legislative intent of ensuring notice is published in the newspaper most likely to reach the intended recipient.

We also point out that it is questionable that a court would conclude that an online newspaper meets the requirement of being "generally circulated." This potential flaw was also addressed by the Office of the Ohio Attorney General. See Op. Ohio Att'y Gen., 2008 WL 1952097, n.10, (April 30, 2008). The opinion commented that:

"[d]etermining whether an online version of a newspaper is generally circulated may be problematic when considering the meaning of 'circulated' and the availability of ready Internet access to the general public. "[C]irculate" means "to come into the hands of readers; *specif*: to become sold or distributed." *Merriam-Webster's Collegiate Dictionary* 224 (11th ed. 2007). "[G]enerally" means "as a rule." *Id.* at 520. If access to the Internet is not widespread, an online newspaper may not attain enough readership to meet the [Ohio Statute's] requirement that it be "circulated generally."

Id.

Although the percentage of American households that have internet access cited by the Ohio Attorney General has increased since the time the opinion was issued, access to the internet remains varied between certain demographics. According to the most recent survey conducted by the United States Census Bureau, nearly seventy five percent of American households have internet access. Thom File & Camille Ryan, U.S. Census Bureau, Computer and Internet Use in the United States: 2013 3 (2014). However, only forty three percent of households who have less than a high school education, and fifty eight percent of those individuals ages sixty five and older, have internet access in the home. Id. In addition, forty eight percent of low income households making less than \$25,000 per year have home internet access Id. Accordingly, even if online newspapers used for notice were restricted to online newspapers published with the intent of reaching the location where the intended recipient is located, it would remain uncertain

whether internet access within the area where notice is intended would be high enough for a court to consider the online newspaper as being “generally circulated.”

Conclusion

It is the opinion of this Office that extending the definition of a newspaper of general circulation as used in various notice statutes within our State to an online newspaper would run astray to the legislature’s intent of requiring publication in a newspaper that will most likely reach the intended recipient. If the definition of a newspaper of general circulation was extended to online newspapers, the geographic restrictions imposed in the notice statutes would be meaningless because any online newspaper across the globe could be seen as meeting the requirements since online newspapers can be accessed from one’s computer from locations worldwide.

Furthermore, even if the online newspaper used for notice was restricted to online newspapers intended to reach the location where the individuals affected by the notice statute were located, it would remain questionable whether a court would find the online newspaper as being “generally circulated.” This is so because access to the internet may not be widespread within the area the intended recipients are located.

While we do acknowledge that with the proliferation of digital news sources courts and scholars alike have found the requirement of publishing in a newspaper of general circulation as becoming more and more antiquated², absent amendment of notice statutes requiring notice in a newspaper of general circulation by our legislature, we do not believe that the term newspaper of general circulation can be extended to include online newspapers.

If we can assist with anything further, please do not hesitate to contact our Office.

Very truly yours,



Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

² See, e.g., In re Establishment of the Press-Enterprise as a Newspaper of General Circulation, 236 Cal. App. 4th 757, n.4 (Cal. Ct. App. 2015) (questioning whether it was pragmatic for the legislature to retain specific production and location requirements imposed by a 1923 statute in the age of online news); Op. Ala. Att’y Gen., 2015 WL 2452607 (May 12, 2015 (discussing a probate court opinion acknowledging that “newspaper notice is becoming antiquated”); see generally Lauren A. Rieders, Old Principles, New Technology, and the Future of Notice in Newspapers, 38 Hofstra L. Rev. 1009 (2010).