

March 3, 1994

The Honorable Robert C. Geddes
Idaho House of Representatives
HAND DELIVERED

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Publication

Dear Representative Geddes:

QUESTIONS PRESENTED

1. What is meant by the term "newspaper of general circulation in the county" as used in Idaho Code § 14-518 relating to notice and publication of lists of abandoned property?
2. Under Idaho Code § 14-518, must a newspaper of general circulation be published or printed in the county where notice is required?

CONCLUSIONS

1. For a newspaper to be a "newspaper of general circulation in the county" so as to qualify to publish notice pursuant to Idaho Code § 14-518, the newspaper must have a content appealing to the public generally, it must contain news of general interest to the community and to the average reader in the county, it must have more than a de minimis number of actual paid subscribers in the county, it must be geographically diverse in that its distribution must not be entirely limited to one community or section of the county and it must be available to anyone in the county who wishes to subscribe.
2. A newspaper which is not printed or published in the county in which it is distributed and does not maintain an office in the county in which it is distributed may nonetheless be a newspaper of general circulation in that county if it meets the above criteria.

ANALYSIS

A. Newspaper of General Circulation

Idaho Code § 14-518 provides in relevant part:

Notice and publication of lists of abandoned property. --(1) The administrator shall cause a notice to be published annually each year, at least once a week for two (2) consecutive weeks in newspapers of general circulation, or in a published notice distributed, one (1) time only, concurrently with a newspaper of general circulation in the county of this state in which is located the last known address of any person to be named in the notice.

The only requirement of newspapers carrying lists of unclaimed property is that they be "a newspaper of general circulation in the county." When compared to statutory requirements for other types of published notice in Idaho as well as in other states, the requirements contained in Idaho Code § 14-518 are minimal. Often, statutory requirements mandate that the newspaper be printed or published in the jurisdiction where notice is required to be given, that it have a certain number of paid subscribers or that it have been published for a certain number of consecutive weeks or months in order to qualify as a paper in which legal notice can be given.

The primary purpose of notice by publication requirements, such as the one contained in Idaho Code § 14-518, is to ensure that the printing of legal notice will receive the widest distribution and publicity practicable. Consequently, statutes of the same type as Idaho Code § 14-518 often set forth a number of requirements which must be met by newspapers carrying the notice.

The requirement of a paper of general circulation was discussed by the Idaho Supreme Court in the case of Robinson v. Latah County, 56 Idaho 759, 59 P.2d 19 (1936). While the Robinson case discusses a different statutory publication requirement and does not define the term "general circulation," it does give some guidance as to what is meant by the term.

It seems clear that the legislature intended . . . that commissioners' proceedings be published in the [newspaper] "most likely to give notice thereof." And it is evident that the legislature made *effective notice* the controlling consideration.

Id. at 767. Courts of other jurisdiction have defined what is meant by a newspaper of general circulation. For instance, Great Southern Media, Inc. v. McDowell County, 284 S.E.2d 457 (N.C. 1981):

[F]or a newspaper to be one of general circulation to actual paid subscribers in the taxing unit, it must meet this four pronged test. First it must have a

content that appeals to the public generally. Second, it must have more than a de minimis number of actual paid subscribers in the taxing unit. Third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit. Fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it.

284 S.E.2d at 467.

The Alaska Supreme Court in Moore v. State of Alaska, 553 P.2d 8 (Alaska 1976), held that a newspaper which carried news on a variety of subjects of general interest to the average reader and which had a circulation of approximately 5% of the total population was a newspaper of general circulation for the purpose of an Alaska statute requiring notice of the sale of state lands. The Alaska court went on to hold that a newspaper which contains news of general interest to the community and reaches a diverse readership is a "newspaper of general circulation" for purposes of Alaska's notification requirement for the sale of state lands.

The case law from Alaska and North Carolina is in accord with the general rule:

It is accepted generally that for a publication to be considered in law a newspaper of general circulation it must contain items of general interest to the public, such as news of political, religious, commercial or social affairs. And in the absence of a statutory definition, a newspaper may ordinarily be said to be one of general circulation even though the paper is devoted to the interests of a particular class of persons and specializes in news and intelligence primarily of interest to that class, if, in addition to such special news, the paper also publishes news of a general character and of a general interest, and to some extent circulates among the general public.

58 Am. Jur. 2d *Newspapers* § 42.

Whether a newspaper is of general circulation involves consideration of a number of elements other than just the number of readers or subscribers. The heterogeneity of subscribers and the extent of circulation are two primary factors looked to by the courts. N.H. Ranch Co. v. Gann, 82 P.2d 632 (N. Mex. 1938). Whether a newspaper is one of general circulation is more a question of substance rather than the size of the newspaper or the number of subscribers. The size of the paper's readership or the number of subscribers is only one factor to be considered. 58 Am. Jur. 2d *Newspapers* § 43. The Idaho Supreme Court in Robinson discussed some of the factors to be considered in determining whether a newspaper is one of general circulation:

While, as just stated, the actual circulation of a newspaper is an important element of "notice," it is not decisive. There are other elements which may be taken into consideration. For example: Suppose that one paper, "A", has an actual circulation of 2,000 copies generally distributed throughout the various precincts of the county, and that its competitor, "B", has an actual circulation of 2,500 copies confined largely to a single town; or that "B" is a sectarian paper--its subscribers for the most part being members of a particular sect, residing in a single locality; or that most of "B's" subscribers belong to a particular nationality. Under these circumstances, a board may, in the exercise of sound discretion, vested in it by statute, award county printing to "A", even though its circulation, numerically, is not as large as "B's." Otherwise, the very purpose of this statute might be defeated. However, where there is a controversy between two newspapers as to which one would most likely give effective notice, the circulation of the particular newspaper to which the board makes its award, or with which it contracts, and the circulation of the newspaper contesting the award, are the only circulations which can be considered.

56 Idaho at 768, 59 P.2d at 23.

The presence or absence of advertising of interest to the general public is also a factor to be considered in determining whether a newspaper is of general circulation. 58 Am. Jur. 2d *Newspapers* § 46. In other words, advertisement which would only be of interest to a particular sect, profession or nationality would be an indication that the newspaper is not of general circulation. However, it is clear that the primary consideration does not concern advertising but rather the variance of circulation and the type of news and whether that news is of interest to the general public. A publication which is devoted chiefly to a particular class, profession or religion will not disqualify a paper from being one of general circulation if the paper also devotes columns to dissemination of news of importance and interest to the public generally and if, in fact, the paper is circulated amongst the general public. McDonald v. Shreveport Mutual Building Association, 152 So. 318 (La. 1934).

Some states impose by statute a requirement that circulation be determined by looking at a list of paid subscribers. See, e.g., In re Carson Bulletin, 85 Cal. App. 3d 785 (1978). In the absence of an express statutory requirement, however, it appears that newsstand sales should be included. The Kentucky Court of Appeals ruled:

Even though only six percent of the estimated 5,700 households in Mason County had paid subscriptions to *The Post* in March 1987, *The Post* is also available at newsstands and at convenience stores. Moreover, we do not think that the number of subscriptions is the controlling factor in

determining whether a newspaper has a general circulation. Indeed, by relying on a "numbers game" to decide if a newspaper has "general circulation" in a particular area, the clear purpose of the act could be frustrated.

E.W. Scripps Co. v. City of Maysville, 790 S.W.2d 450, 452 (Ky. Ct. App. 1990).

Idaho Code § 14-518 has no requirement relating to paid subscription and, therefore, newsstand sales should be included. However, in resort areas an Idaho court might be expected to scrutinize newsstand sales if it appears that they are generated by out-of-town residents and that, in fact, the out of town or out-of-county newspaper is not being purchased by locals. Certainly, an Idaho court might be expected to require at least some paid subscribers.

B. Place of Publication

It is not a requirement that a newspaper be published or printed in a particular county in order to be considered a newspaper of general circulation for that county. In E.W. Scripps v. City of Maysville, the Kentucky Court of Appeals held:

We hold that to be entitled to notice of special meetings, a newspaper must show that it serves a limited geographical area and that its coverage of news in a particular city or county as regular and intensive.

Clearly, *The Post* is a newspaper because it is distributed within a limited twelve county region which includes Maysville and Mason County. Secondly, *The Post* has a general circulation because it provides more than random coverage of news of Maysville and Mason County. Indeed, *The Post* demonstrated that it gathers and reports economic, educational, sports, human interest, government and court news at the local level.

790 S.W.2d at 452.

The Idaho Supreme Court, in a 1988 decision, distinguished circulation from publication and in so doing appears to have held that circulation in a particular locale does not require that the paper be printed or published there. In Express Publishing, Inc. v. City of Ketchum, 114 Idaho 114, 753 P.2d 1260 (1988), the court ruled:

Based on the above facts, and its view of the strictures of I.C. § 50-213, the trial court correctly concluded that the only question presented to him on summary judgment was whether *Idaho Mountain Express* was the *only* newspaper "published" within the city limits of Ketchum. As above noted,

the district court concluded that the *Express* was the *only* newspaper "published" within the city limits of Ketchum.

The *Woodriver Journal* asserts that the word "published" as contained in Idaho Code § 50-213 must be given a meaning "to disseminate" or "to circulate." The District Court concluded otherwise and stated "the language of Idaho Code § 50-213 manifests a legislative intent to distinguish a newspaper's place of publication from its place of circulation. We agree.

114 Idaho at 116, 753 P.2d at 1262.

In order to be a "newspaper of general circulation in the county," it is not necessary that the newspaper be actually published or printed in the particular county. It is sufficient if the newspaper is circulated to a wide cross-section of the county's residents and that the newspaper be of the type which carries information which will be of interest to the public at large and of interest to the citizens of that county. In determining whether publication in a particular newspaper satisfies the requirement of Idaho Code § 14-518 or of a similar statute, the primary purpose for publication should be kept in mind. If more than one paper qualifies as a "newspaper of general circulation," the agency administrator is given discretion to choose the paper which will publish the notice.

Very truly yours,

WILLIAM A. VON TAGEN
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