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PUBLICATION OF LEGAL NOTICES IN NEW YORK: GUIDELINES FOR A REVISION

The content and duration of a legal notice and the procedure for publishing it should be functions of its purpose—to effectively disseminate information to interested parties. However, present New York publication requirements reveal little consistency of approach and seem ill-designed to accomplish their purpose. An examination of representative statutory provisions exposes current deficiencies and suggests the need for a simplified and uniform statutory structure.[1]

I

Present Deficiencies

A. *Content*

The content of legal notices addressed to businessmen and other commercial sophisticates is generally well-suited to the intended recipients of such notices. Those who extend credit in the normal course of business appreciate[2] the significance of notices of corporate dissolution[3] and inquiries to creditors regarding applications for partition of real property.[4] Publication in full of a certificate containing a list of persons continuing to do business under a partnership name after the addition or retirement of a partner[5] informs the commercial community of those who will henceforth be personally responsible for the partnership's activities.[6]

On the other hand, the content of notices of public hearings

1 To ferret out the problems experienced by persons in daily contact with notice provisions, and to solicit suggestions for workable guidelines for a revision, questionnaires were submitted to and interviews conducted with lawyers, judges, government officials, and newspaper representatives. Persons providing information did not prohibit its use, but some asked that they not be identified by name. Therefore, reference is made herein only to the general category from which the information was derived; *e.g.*, *Correspondence File, Attorneys*.

2 *Correspondence File, Attorneys.*

3 N.Y. Bus. Corp. Law § 1007 (McKinney 1963).

4 N.Y. Real Prop. Actions Law § 913 (McKinney 1963).

5 N.Y. Partnership Law § 81 (McKinney 1948).

6 Consolidation of existing provisions for commercial notices might profitably be undertaken, however. In the Banking Law, for example, there are at least 7 separate provisions governing notice by financial institutions of changes in location of their principal places of business. *See* N.Y. Banking Law §§ 28, 113, 241, 296, 396, 460, 511 (McKinney Supp. 1968).

frequently frustrates their purpose.[7] The readers of these notices lack sophistication in the areas involved, yet the statutes repeatedly direct publication of long, technically-worded proposals. The reader is discouraged from making even an attempt to read them. For example, a town board proposing to make sewer or water improvements must initially publish a copy of the order specifying the boundary of the proposed district, the maximum amount to be expended, the anticipated method of apportioning costs, the proposed method of financing, the time and place of hearing, and the fact that the pertinent plans, maps, and reports are on file with the town clerk and available for public inspection.[8] If, following an initial public hearing, the boundary of the proposed district or the method of apportioning costs is changed, an additional hearing upon notice is required. This second notice must not only specify the manner in which the boundary or the apportionment is to be altered but must also contain the same information as the first.[9] Other notices are required in the event of an increase in the maximum amount to be expended upon the project[10] or a change in apportionment of costs after completion of the project.[11] Similarly detailed content requirements must be satisfied for every major expenditure of public funds by a municipal government.[12]

In addition to notices of hearings, local governments are required to publish notice of various administrative and legislative actions. Whenever a city traffic agency is created, all of its rules, regulations, and ordinances must be published.[13] Town and county boards

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7 It has been suggested that governmental bodies usually make their decisions in advance of public hearings and that the latter are devoid of actual significance. *Correspondence File, Attorneys.* It would seem that public apathy, which is primarily responsible for this situation where it exists, could be at least partially reduced by improved notice of the hearings.

8 N.Y. Town Law § 209-q(3) (McKinney Supp. 1968).

9 *Id.* § 209-q(4).

10 *Id.* § 209-q(5).

11 *Id.* § 209-q(8)(c). Other examples of notice requirements whose detail probably discourages rather than fosters an informed public are the Public Authorities Law and the Rapid Transit Law, which require publication *in full* of proposed resolutions authorizing additional transportation routes. *See* N.Y. Pub. Auth. Law § 1203-a(1)(f) (McKinney Supp. 1968); N.Y. Rapid Transit Law § 21 (McKinney Supp. 1968). Synopses of the resolutions in easily understandable terms, details being made available to interested persons, would more readily engage public interest and would certainly be less expensive.

12 N.Y. Town Law § 209-q(10) (McKinney Supp. 1968). Although frivolous petitions are discouraged by the requirement, this is insufficient justification for publishing extravagant, inconsequential notices.

13 N.Y. Gen. City Law § 20(32) (McKinney 1968).

may, at their discretion, publish the minutes of their proceedings.[14] Towns are required to publish every new ordinance or amendment;[15] failure to do so renders the enactment void.[16]

The vast majority of notices required by New York law are self-defeating in their length and complexity. Concise resumés of matters that should be brought to the attention of the public[17] would enhance the probability that local residents will read and understand the notices.[18] If the information to be conveyed is prohibitively long or technical, the subject matter could be described in general terms and interested citizens referred to the public official who will make the information available for inspection.[19] In addition, abbreviated, and therefore less expensive,[20] notices could be published more frequently and for a longer period of time.

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14 N.Y. COUNTY LAW § 211 (McKinney Supp. 1968); N.Y. TOWN LAW § 64(11-b) (McKinney 1965).

15 N.Y. TOWN LAW § 133 (McKinney 1965).

16 Town of Clarendon v. Jary, 41 Misc. 2d 662, 246 N.Y.S.2d 471 (Orleans County Ct. 1964). "The reason for regarding publication or notice of pendency of an ordinance as mandatory is that the requirement is one of substance and not mere form." 5 E. McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 16.78, at 301 (3d ed. 1949) (footnote omitted). The defect, however, is curable:

> [S]ince Town Law §§ 133 and 264 do not provide that an ordinance be published and posted within any specified time after its adoption but simply provide in effect that an ordinance shall not become effective until ten days after publication and posting, a defect in either respect can be cured at virtually any time by a current publishing, or posting, or both, as the case may be.

20 OP. STATE COMP. 543, 545 (1965).

17 Doubtless some notices should be eliminated altogether. Consider, for example, the requirement that a certified copy of a town supervisor's annual financial report be published even when copies of the report have been distributed to every taxpayer. N.Y. TOWN LAW § 29(10) (McKinney 1965); *see* 3 OP. STATE COMP. 24 (1947). And it would seem that notice of the issuance of liquor licenses (N.Y. ALCO. BEV. CONTROL LAW § 107(1) (McKinney Supp. 1968)) could be eliminated without depriving the public of vital information.

18 Even where requirements are reasonably designed to convey information of widespread interest, the statutory provisions are often unduly repetitious and warrant consolidation. The Vehicle and Traffic Law, for example, contains 3 identical provisions for notice of temporary exclusion of certain vehicles from state, county, and town highways. *See* N.Y. VEH. & TRAF. LAW §§ 1621(d), 1650(a)(4), 1660(a)(1) (McKinney 1960).

19 This approach is suggested by current procedures for village incorporation and assessments for local improvements. *See* N.Y. VILLAGE LAW §§ 3-304, 280(2) (McKinney 1966).

20 The expense of publishing a notice that accomplishes nothing is always regrettable; it is especially so, however, when it defeats the notice's purpose. The cost of notices directed to owners of lost or abandoned property, for example, are typically charged against the value of the property (*see, e.g.*, N.Y. ABAND. PROP. LAW § 1409 (McKinney Supp. 1968); N.Y. NAV. LAW § 139 (McKinney 1941); N.Y.R.R. LAW § 68 (McKinney 1952)), and detailed descriptions and extraneous information may be sufficiently expensive to reduce drastically the net value of the property. The quaint language of N.Y. NAV. LAW § 139 (McKinney 1941) is an extreme example:

B. *Duration and Frequency of Publication*

The relationship of frequency and duration requirements to statutory purpose is not apparent in many notice provisions.[21] The better provisions are again the commercially-oriented ones, where a few statutes combine minimum frequency and duration of publication requirements with broad discretion in the court to add to them as necessary. The Debtor and Creditor Law provides for judicial supervision of notice to creditors on the debtor's discharge from imprisonment,[22] notice of cancellation of a judgment following discharge in bankruptcy,[23] and notice to creditors to present claims regarding assignments for their benefit.[24]

Other provisions, however, demonstrate blatant inconsistencies in the statutory scheme.[25] Inexplicably, periods of publication speci-

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> Every such notice shall contain a minute description of such wrecked property, and every bale, bag, box, cask, piece or parcel thereof, and of the marks, brands, letters and figures on each, and shall state where such wrecked property then is, and its actual condition, and the name, if known, of the vessel from which it was taken or case on shore, and of the master and supercargo of such vessel, and the place where such vessel then is, and its actual condition.

Id.

If the cost involved is disproportionate to the value of the property, the current solution is to dispense with publication altogether. *See* N.Y. ABAND. PROP. LAW § 1411 (McKinney 1944). Discontinuance of publication, however, seems to put a premium on the ability to lose valuable property.

The incidence of some publication expenses may also be criticized. Real property owners, for example, may petition the town board of supervisors for construction of a sewer or water improvement but must accompany the petition with a $100 deposit to cover publication costs. If the project is ultimately approved, the deposit is refunded; if it is disapproved, only the unused portion, if any, is refunded. Conceding that property owners should properly be called upon to bear some of the costs of improving their property, it seems unfair that they should be compelled to finance superfluous notices.

21 Indeed, it is sometimes unclear whether the controlling factor is a desire to give notice or to do something else, such as express social disapproval. A pawnbroker, for example, in order to sell an unclaimed pledge, must publish notice of the sale daily for 6 days in 2 newspapers in his place of business and in 2 newspapers designated by the mayor of the place of the sale. N.Y. GEN. BUS. LAW § 49(1) (McKinney 1968). It is not clear whether publication in 4 separate newspapers is required.

22 N.Y. DEBT. & CRED. LAW § 126 (McKinney Supp. 1968).

23 *Id.* § 150(6).

24 *Id.* § 5 (McKinney 1945).

25 It is sometimes difficult to determine exactly what the frequency and duration requirements are. In Albany v. Goodman, 203 App. Div. 530, 197 N.Y.S. 739 (3d Dep't 1922), the city could sell municipal real property at public auction only after publishing notice "once each week for three weeks." The notice was published once in each of the 3 weeks prior to the auction, but the first publication occurred only 18 days before the sale. Because 21 days had not elapsed, the court held that notice was defective, and that title to property purchased at the sale was not marketable. As a general rule, however, courts will not invalidate a transaction because of a technical defect in notice where it appears that the person attacking its validity had actual notice. *See, e.g.*, Village of

fied for essentially identical notices differ significantly. There is no apparent reason, for example, why service by publication in disciplinary proceedings against pharmacists,[26] nurses,[27] and podiatrists[28] should differ from service in similar proceedings against surveyors,[29] accountants,[30] architects,[31] and lawyers.[32] Similarly inconsistent provisions govern notices of hearings. Towns must publish notice of zoning hearings at least ten days prior thereto[33]—the requirement as to villages is at least fifteen days.[34] Notice of hearings held by a town to consider petitions for sewer improvements must be published at least ten and not more than twenty days in advance;[35] a village con-

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Lynbrook v. Cadoo, 252 N.Y. 308, 169 N.E. 394 (1929) (publication of notice of election for 9 days instead of the statutory 10); Levine v. Town of Oyster Bay, 46 Misc. 2d 106, 259 N.Y.S.2d 247 (Sup. Ct. 1964) (notice published in paper claimed not to be one of "general circulation").

The most troublesome notice provision to practitioners is apparently § 231 of the Real Property Actions and Proceedings Law. *Correspondence File, Attorneys.* This section governs notice of the sale of real property "made in pursuance of a judgment affecting the title to, or the possession, enjoyment or use of, real property." N.Y. REAL PROP. ACTIONS LAW § 231(1) (McKinney 1963). Publication is required either twice a week for 3 successive weeks or once a week for 4 successive weeks. *Id.* § 231(2) (McKinney Supp. 1968). But the complex and ambiguous language of the section makes it difficult to ascertain which is proper under given circumstances. Faced with this problem, one court recently held:

> The statute can be read either way, that is, if it conveys any meaning at all. Noncompliance with advertising requirements has been a jurisdictional defect posing a threat to the title issued in a foreclosure sale . . . . The very language of the statute casts general doubt on titles obtained through foreclosure sales. The court urges the Legislature to correct this anomaly.

Gordon v. Haltaufderhyde, 54 Misc. 2d 841, 842-43, 283 N.Y.S.2d 400, 401 (Sup. Ct. 1967). The reasons for the complexity of the section are not clear. In considering amendment of the section in 1965, the New York Law Revision Commission was unable to discover the substantive bases, if any, for the differences; as a result, only minor changes were made pending further investigation. Interview with Miss Rosemary Edelman, Director of Research, New York Law Revision Commission. The distinctions sought to be drawn may be explicable as an attempt to rectify disparities in circulation and frequency of publication between urban daily newspapers and rural weeklies. Whatever the origin and current validity of the varying requirements, however, the section must at least be redrafted for purposes of clarity. Most lawyers commenting on § 231 agreed with one correspoudent that it represented "legislative draftsmanship at its worst." *Correspondence File, Attorneys.*

26 N.Y. EDUC. LAW § 6804(2) (McKinney 1953) (twice in each of 2 successive weeks).

27 *Id.* § 6911(3) (McKinney Supp. 1968).

28 *Id.* § 7011(4) (McKinney 1953).

29 *Id.* § 7210 (4 times at least 30 days prior to the hearing).

30 *Id.* § 7406(3) (McKinney Supp. 1968) (4 times at least 30 days prior to the hearing).

31 *Id.* § 7308(2) (McKinney 1953) (once per week for 4 consecutive weeks, the last publication appearing at least 30 days prior to the hearing).

32 N.Y. JUDICIARY LAW § 90(6) (McKinney 1968) (discretionary with the court).

33 N.Y. TOWN LAW § 264 (McKinney 1965).

34 N.Y. VILLAGE LAW § 178(1) (McKinney 1966).

35 N.Y. TOWN LAW § 199(2) (McKinney 1965); *id.* § 200(7) (McKinney Supp. 1968).

ducting hearings of the same nature must twice publish notice thereof, the first publication not later than the tenth day before the hearing.[36] If there is a substantive purpose to be served by a particular period of publication, it should control in all similar situations. If form only is involved, uniformity is equally desirable.

C. *Publication Procedures*

Lack of uniformity also characterizes provisions stating the number of newspapers to be selected. Occasionally, a provision mentions simply that a notice must be published;[37] in other situations, the number of newspapers is purely discretionary.[38] Although minimum standards are set in most cases,[39] no clear policy emerges from the different requirements. It is unclear, for example, why upon dissolution of a business corporation notice to creditors must appear in two newspapers,[40] while after an assignment for the benefit of creditors notice need be printed in only one.[41]

Similar variations appear in the provisions governing civil actions. Notice that a petition has been filed to dissolve a marriage on the ground of absence appears in only one newspaper,[42] as does the summons in an action for neglect.[43] In other domestic relations cases, however, service must be in two newspapers.[44] In Tompkins County, for instance, process in matrimonial actions must usually appear in

36 N.Y. VILLAGE LAW § 263-a(c) (McKinney 1966).

37 *See, e.g.*, N.Y. CIV. SERV. LAW § 20(2) (McKinney Supp. 1968).

38 *See, e.g.*, N.Y. SURR. CT. PROC. LAW §§ 805(2), 1801 (McKinney 1967).

39 Many provisions specify the number of newspapers in which a notice must be published. *See, e.g.*, N.Y. ABAND. PROP. LAW § 202 (McKinney Supp. 1968); N.Y. BANKING LAW § 601(2) (McKinney Supp. 1968). Other provisions establish a minimum number of papers. *See, e.g.*, N.Y. BUS. CORP. LAW § 1215(b) (McKinney 1963); N.Y. PUB. LANDS LAW § 33(1) (McKinney Supp. 1968).

40 N.Y. BUS. CORP. LAW § 1207(a)(1) (McKinney 1963).

41 N.Y. DEBT. & CRED. LAW § 5 (McKinney 1945).

42 N.Y. DOM. REL. LAW § 221(1) (McKinney 1964).

43 N.Y. FAMILY CT. ACT § 617(c) (McKinney 1963).

44 Reference is made to the C.P.L.R. for methods of serving a summons in certain family offense actions and in paternity proceedings. *Id.* §§ 525(b), 826(b). Publication pursuant to that statute must be in 2 newspapers. N.Y. CIV. PRAC. LAW § 316(a) (McKinney 1963). Matrimonial actions are generally governed by the C.P.L.R. methods of service, except that service must be either personal or by publication. N.Y. DOM. REL. LAW § 232 (McKinney 1964). *See also* Root v. Root, 43 Misc. 2d 337, 350 N.Y.S.2d 933 (Sup. Ct. 1964).

Service by publication is not limited to domestic matters. Under certain circumstances, a court is allowed to authorize service in newspapers for virtually any civil action. *See* N.Y. CIV. PRAC. LAW § 308(4) (McKinney 1963). Additionally, other statutes refer to the C.P.L.R. for service requirements. *See, e.g.*, N.Y. CONDEM. LAW § 6 (McKinney Supp. 1968).

the *Ithaca Journal*, a newspaper with a daily circulation of 17,167,[45] and in the *Dryden Rural News*, a weekly with a circulation of about 1,750.[46] It seems unlikely that when circulation overlaps, publication in the smaller newspaper will afford such additional publicity as to justify the increased costs and administrative effort.

Many provisions are anachronisms in this age of mass communications media and large daily newspapers with wide circulation. If notice that one has received a liquor license is worthy of publication at all, it is doubtful that it need be published in a weekly as well as a daily paper.[47] Retention of posting requirements is also questionable, yet certain notices are still publicized by posting alone;[48] others require posting and newspaper publication.[49] Strangely, some provisions require posting if a suitable local newspaper cannot be designated[50] rather than authorizing use of newspapers in an adjoining area.[51] And even among the anachronisms, no pattern is to be found.[52]

Finally, if notices are to be effective, statutes must also provide for conspicuous placement in newspapers and for typeface of size and shading sufficient to attract the reader's attention and facilitate reading. At present, notices are often scattered randomly throughout a newspaper and the print is too small for comfortable reading. If the process of notice by publication as a whole is to be improved,

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45 DIRECTORY OF NEWSPAPERS AND PERIODICALS 711 (N.W. Ayer & Son, Inc. ed. 1968). The figures were obtained from a statement submitted to the Audit Bureau of Circulations by the *Journal* for the 6-month period ending Sept. 30, 1967. *Id.* at vi.

46 *Id.* at 702. This circulation figure was given in a statement of ownership, management, and circulation submitted by the *News* to the Post Office Department on October 1, 1967. *Id.* at vi.

47 N.Y. ALCO. BEV. CONTROL LAW § 107(2) (McKinney Supp. 1968).

48 N.Y. ELECTION LAW § 81(2) (McKinney 1964).

49 *See, e.g.*, N.Y. MEMBERSHIP CORPS. LAW § 100 (McKinney 1941); N.Y. TOWN LAW §§ 82, 133, 264 (McKinney 1965); *id.* § 193 (McKinney Supp. 1968); N.Y. VILLAGE LAW §§ 3-346(1), 95 (McKinney 1966).

50 *See, e.g.*, N.Y. EDUC. LAW §§ 1716, 2004(1), 2007(1) (McKinney 1969); N.Y. GEN. MUNIC. LAW §§ 35(2), 79-a, 120-p (McKinney 1965); N.Y. LIEN LAW § 202 (McKinney Supp. 1968).

The cited provisions from the Education Law require posting in the 20 most couspicuous places in the district. It is difficult to predict how this determination would be made.

51 *See, e.g.*, N.Y. CANAL LAW § 30(1) (McKinney Supp. 1968); N.Y. GEN. MUNIC. LAW § 360(5) (McKinney Supp. 1968); N.Y. LIEN LAW § 122 (McKinney 1966).

52 Notice of a sale to enforce a monument lien, for example, is to be published in the town or city *nearest to* the place of sale if no newspaper is published therein. N.Y. LIEN LAW § 122 (McKinney 1966). Notice of a sale to satisfy liens on personal property is to be posted in at least 6 conspicuous places. N.Y. LIEN LAW § 202(1) (McKinney Supp. 1968).

efforts must be directed towards the solution of these problems as well as towards those of substantive importance.

D. *Problems of Designation*

1. *Designation Criteria*

The newspaper designated to print a notice should be the one most likely to reach the persons to be affected. In most instances, only the vaguest of guidelines assist the person charged with selecting the journal in which to publish any given notice.[53] For example, the C.P.L.R.[54] and Surrogate's Court Procedure Act[55] authorize service of process by newspaper publication in newspapers "designated in the order [for publication] as most likely to give notice to the person to be served . . . ."[56] Similar provisions in the Debtor and Creditor Law[57] regulate notices and citations to those interested in the funds of an incompetent. The County Law specifically mandates that newspapers chosen to publish notices of hearings must have "due regard for circulation in the municipality affected."[58]

Although such latitude is desirable in theory, it often produces undesirable results in practice. The exercise of discretion is too often based on cost,[59] with insufficient consideration of other pertinent factors. Where an heir is unknown or an abandoning spouse has left home for parts unknown, only chance will bring the publication

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53 Many provisions state only that the designated newspaper must be published in the particular town, county, or district—there are no requirements with respect to the paper's circulation in the locality affected. *See, e.g.*, N.Y. ALCO. BEV. CONTROL LAW § 141(3) (McKinney Supp. 1968); N.Y. REAL PROP. ACTIONS LAW § 1402(1) (McKinney 1963).

54 *See* N.Y. CIV. PRAC. LAW §§ 308(4), 314-16 (McKinney 1963). Service by publication is usually ordered only after diligent efforts have been made to serve the defendant personally. Where the defendant's name and address are known, publication alone is not constitutionally permissible. *See* Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

55 N.Y. SURR. CT. PROC. LAW § 307(2) (McKinney 1967).

56 N.Y. CIV. PRAC. LAW § 316 (McKinney 1963). This wording is undoubtedly the result of Supreme Court decisions requiring notice to be "reasonably calculated to reach" the respondent. *See* note 54 *supra*.

57 N.Y. DEBT. & CRED. LAW §§ 250, 254 (McKinney Supp. 1968).

58 N.Y. COUNTY LAW § 227(2) (McKinney Supp. 1968). There are no other similar provisions in the County Law.

59 *Correspondence File, Attorneys.* One large New York City firm uses the services of an advertising agency, which receives its commissions from the newspapers. Although the firm does not publish extensively, it has had occasion to publish under the C.P.L.R. and Surrogate's Court Procedure Act. Most of these notices appear in the *New York Law Journal* and in the *Chief*, a civil service paper, because publication rates for these newspapers are least expensive. *Id.*

to his attention.[60] But a low probability becomes a nullity when lawyers and judges choose rural newspapers of limited circulation merely on the basis of cost of publication.[61] Seemingly, if a person formerly residing in a small town or village cannot be located for personal service, notice published in that locality will be of no avail. In cases involving residents of larger cities, service in small rural newspapers will be equally ineffective.[62] In addition, publications in mercantile and legal journals reach only a limited group, which does not ordinarily include the recipients of notices in civil actions.[63] Even if chances of reaching an interested party so he might participate in a civil action or public hearing are minimal, efforts would be more profitably directed towards publication in widely circulated papers of general interest. Discretion in journal selection should not be removed entirely; it should be controlled.

2. *Designation in the Municipal Laws*

The greatest concentration of notice provisions in New York's codified laws is found in the laws affecting local governments. In addition to containing many of the defects previously discussed, these statutes provide dramatic examples of the shortcomings in designation of newspapers for notice provisions.

a. *New York County Law, Section 214.* Perhaps the best illustration of a designation provision's failure to fulfill its purpose is section 214 of the County Law,[64] which specifies the procedure for selecting county newspapers. On its face, the section supplies the vehicle for wide publicity through a partisan press.[65] The provision entitles each of the two major political parties on the county board of supervisors to choose annually a newspaper to publish concurrent resolutions of the state legislature, election notices, and the official

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60 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); *Correspondence File, Attorneys; Correspondence File, Judges.*

61 This means of economizing on expenses is not uncommon. *Correspondence File, Attorneys.*

62 Several attorneys practicing in larger cities admitted that their own firms have engaged in this practice. *Id.*

63 Many firms in the New York City and Buffalo areas publish summonses and surrogate's matters in these legal and mercantile journals. *Correspondence File, Attorneys.* The first and second judicial departments have facilitated this practice by designating the *New York Law Journal* as an official newspaper pursuant to § 91 of the Judiciary Law.

64 N.Y. COUNTY LAW § 214 (McKinney Supp. 1968).

65 "[P]ublicity not patronage is intended, although the publicity is to be obtained through a partisan press." 1912 OP. ATT'Y GEN. 379, 381. *See also* People *ex rel.* Guernsey v. Somers, 130 N.Y.S. 761 (Sup. Ct. 1911), *aff'd,* 153 App. Div. 623, 138 N.Y.S. 1136 (4th Dep't 1912) *aff'd,* 208 N.Y. 621, 102 N.E. 1110 (1913).

canvass.[66] In addition, the entire board is to select at least two newspapers each year to publish "all local laws, notices and other matters required by law to be published."[67] In designating such newspapers, each board is to consider various political factors[68] and the newspaper's circulation in the county.[69]

During the period when many small newspapers were scattered throughout counties, often with many in each municipality,[70] the practice of using a partisan press may have been justified. However, with demographic shifts accompanying urbanization and the concomitant demise of the small political paper, the political implications and requirements of section 214 have become outmoded and unrealistic.[71] The application of this section has become primarily an exercise of political patronage. Notwithstanding the statute's mandatory consideration of circulation, it is apparent that board selection more often focuses on general subsidization of small newspapers and political rewards for newspapers backing board members. As isolated political and economic necessities, these goals are at least understandable.[72] But it is unjustifiable to emphasize these factors at the expense of reaching large segments of county populations. In Oneida County, for example, the board designated the *Rome Daily Sentinel* and the *Waterville Times* to print concurrent resolutions of the state legislature in 1968.[73] By so designating these newspapers, the

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66 N.Y. COUNTY LAW § 214(1) (McKinney Supp. 1968).

67 *Id.* § 214(2).

68 Under subsection (1) of § 214, consideration is given to the political principles advocated by the newspaper as well as the support of party nominees. Subsection (2), however, requires merely that consideration be given to those papers advocating the principles of the state's 2 major political parties.

69 N.Y. COUNTY LAW §§ 214(1), (2) (McKinney Supp. 1968).

70 In 1879, for example, the Troy City Charter authorized the Common Council to designate up to 4 "official papers." At the time, at least 6 newspapers were published in Troy. *See* People *ex rel.* Frances v. Common Council, 78 N.Y. 33 (1879). Today, such a requirement would be superfluous—only 2 newspapers, published by the same publisher, still exist. DIRECTORY OF NEWSPAPERS AND PERIODICALS, *supra* note 45, at 795.

71 *Correspondence Files, Attorneys, Judges, Newspapers.*

72 That successful candidates reward those who support them is an uncontested fact of political life; political patronage of newspapers is almost as old as the nation itself. For an excellent history of the publication of federal laws in local newspapers, see Katz, *An Episode in Patronage: Federal Laws Published in Newspapers,* 10 AM. J. LEGAL HIST. 214 (1966).

The small newspaper has become a part of small-town life that its readers would like to preserve. It is a prime source of local news and local pride and is heavily dependent upon the revenues obtained by printing legals. *Correspondence File, Newspapers.* It is reasonable, therefore, to expect local politicians to support these newspapers.

73 List of newspapers designated to print concurrent resolutions in 1968; furnished by the Secretary of State to the *Cornell Law Review* and on file in the Cornell Law Library.

board of supervisors rejected both the *Utica Observer Dispatch* and the *Utica Daily Press*—the two newspapers with the largest and widest circulation in the county.[74] Such designation is not atypical; an examination of the Secretary of State's list of official newspapers for the publication of concurrent resolutions in 1968, and a list of official newspapers for all purposes in 1969,[75] reveals that many counties have chosen newspapers without extensive readership. Ramifications extend beyond the publication of concurrent resolutions because other sections of the New York Laws, including those governing tax sales and unredeemed lands,[76] refer to section 214 for designation requirements.[77]

While some county boards have consciously manipulated the statute as a political tool, others have ignored section 214 entirely. Often a board will relinquish the designation process to the newspapers themselves, allowing them to apportion publication.[78] Occasionally, abandonment of the statute accrues to public benefit—as in those rare instances when patronage and subsidization are completely subordinated to circulation.[79] But these attempts at avoiding patronage may backfire, as did a 1962 attempt by the Albany County Board of Supervisors to designate the *Albany Times-Union* to publish local laws and notices. In *Burns v. Joyce*,[80] the court refused to honor the designation on the theory that designated newspapers could not be "fence sitters" under the letter or intent of section 214.[81] On the

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74 The estimated weekly circulation of the *Waterville Times* is 1,137; DIRECTORY OF NEWSPAPERS AND PERIODICALS, *supra* note 45, at 797. *The Rome Sentinel* has a daily circulation of 19,751. *Id.* at 789. Similar ABC statements indicate that the *Observer Dispatch* has a daily circulation of 45,451 (Sunday, 59,305) and the *Press*, 29,220. *Id.* at 796. Although these figures are for 1967, it is unlikely that circulation has changed proportionately among the 4 newspapers.

75 Seemingly, different newspapers would be selected under subsections (1) and (2) of § 214. *See* note 68 *supra*. In most cases, however, boards designate only 2 newspapers. When more are selected, it is usually to divide the publication revenues—not to fulfill the statutory requirements. *Correspondence File, County Boards of Supervisors.*

76 *See* N.Y. REAL PROP. TAX LAW §§ 1002, 1014 (McKinney 1960).

77 Missing the publication of concurrent resolutions would have fewer deleterious consequences than not seeing a notice affecting title to real property. Accordingly, a few boards have designated other newspapers under these special circumstances. This would seem to be a tacit admission by the boards that their original designations were inadequate.

78 This self-division of labor usually takes one of two forms: newspapers either rotate annually—each publishing all notices for a given year—or divide the yearly notices. *Correspondence File, County Boards of Supervisors.* There is no doubt that such a system inhibits effective publicity.

79 A few boards reported that circulation is their ouly consideration in designating newspapers. *Correspondence File, County Boards of Supervisors.*

80 33 Misc. 2d 1088, 228 N.Y.S.2d 532 (Sup. Ct. 1962).

81 In the court's view, an independent newspaper should not be "in the comfortable position, chameleon-like, of changing color in its own interests and at the same time

other hand, where designation is the product of purely political factors, the courts have declined to intervene.[82] One shield has been the wording of section 214 itself, which requires either consideration of "the extent of the circulation in the county"[83] *or* designation of a paper of "general circulation throughout the county."[84] These nebulous standards have never been clearly defined, and, in spite of questionable designation, courts have declined to charge boards with abuse of discretion.

b. *New York Town Law*. The promulgation of notice provisions in the Town Law also deters effective publicity. Although the Town Law does not suffer from the politically oriented designation procedure of the County Law, its provisions often cause confusion and injustice. Unlike counties, towns need not designate an official newspaper[85] but have the option to do so. If a town exercises the statutory option, it must follow the intricate procedures of section 64(11),[86] which requires the chosen paper to be one published in the town if one is published there—irrespective of its circulation in the town. Often, however, newspapers are not published in small towns. The town boards must then look elsewhere under the complicated and ambiguous guidelines of section 64(11).[87]

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demand or expect the patronage accruing to a political newspaper." 33 Misc. 2d at 1090, 228 N.Y.S.2d at 534.

82 The following cases illustrate courts' refusals to charge county boards with abuse of discretion in selecting small newspapers when ones of wider circulation were available: Relihan v. Brink, 285 App. Div. 729, 140 N.Y.S.2d 659 (3d Dep't 1955); People *ex rel.* Utica Sunday Tribune Co. v. Hugo, 93 Misc. 618, 158 N.Y.S. 490 (Sup. Ct. 1916); News-Review Publishing Corp. v. Lomenzo, 53 Misc. 2d 370, 278 N.Y.S.2d 648 (Sup. Ct.), *aff'd*, 28 App. Div. 2d 823, 282 N.Y.S.2d 670 (2d Dep't 1967). *But cf.* People *ex rel.* Guernsey v. Somers, 130 N.Y.S. 761 (Sup. Ct. 1911), *aff'd*, 153 App. Div. 623, 138 N.Y.S. 1136 (4th Dep't 1912), *aff'd*, 208 N.Y. 621, 102 N.E. 1110 (1913).

83 N.Y. COUNTY LAW § 214(1) (McKinney Supp. 1968).

84 *Id.* § 214(2).

85 N.Y. TOWN LAW § 64(11) (McKinney Supp. 1968). *See also* Cowan v. Burns, 110 N.Y.S.2d 671 (Sup. Ct. 1952).

86 N.Y. TOWN LAW § 64(11) (McKinney Supp. 1968).

87 After allowing designation of a newspaper published in the town, the statute continues:

> If no such newspaper is published in the town, and in any town of the second class having a population in excess of sixty thousand according to the latest federal census if there is no newspaper published in such town having general circulation therein, the town board may designate any newspaper published in the county if such newspaper has general circulation in the town or if no newspaper is published in the county entered in a post office within five miles from the town, any other newspaper published in a city or village in an adjoining county and having a circulation in the town. If no official paper has been designated, the town board may authorize the publication of a notice, resolution or ordinance in any newspaper which could be designated as the official newspaper of the town or, if there be no newspaper which is regularly published in the town and entered as

Despite the town's option to choose an official town newspaper and the ambiguity of section 64(11), numerous provisions of the Town Law require publication in the official newspaper without mentioning alternatives.[88] Other sections, however, recognize the possibility that no official newspaper has been selected and provide an alternative procedure.[89] Many provisions make no mention of an official newspaper and merely offer requirements on an ad hoc basis.[90] Why there should be differing desiguation requirements for different types of town notices is unclear.

Reconciling the differences among requirements is difficult, and applying the requirements is confusing. Section 133 of the Town Law requires that, to become effective, ordinances must appear in a newspaper published in the town, if there is one, or in a newspaper published in the county, at the board's discretion.[91] In *Town of Almond v. Penfold*,[92] an Allegany County town published an ordinance in the *Hornell Tribune*, a daily newspaper published some five miles away in Steuben County. To support this designation, the defendant town cited language in section 64(11) authorizing "publication of a notice, resolution or ordinance in any newspaper which could be designated as the official newspaper of the town"[93] when no official paper had otherwise been designated. But the plaintiff successfully contested the validity of the ordinance on the ground that section 133's requirements were mandatory; the *Hornell Tribune* could not publicize the ordinance to the exclusion of the *Alfred Times*, a weekly newspaper published in Allegany County. Thus, despite a statutory conflict and a cross reference to section 64(11) following section 133,[94] and notwithstanding evidence that over five times more *Hornell Tribunes* circulated in Almond than Alfred papers,[95] the court refused to honor the designation:

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second class mail matter, the town board may authorize such publication in any newspaper published and having general circulation in the town. Such authorization shall be deemed a designation of such newspaper as the official paper of the town for the purpose of such publication. Additional newspapers published in the English language may be designated for the publication of such notices, resolutions and ordinances at the option of the town board.

Id.

88 *See, e.g.*, N.Y. TOWN LAW §§ 196, 199, 200, 201 (McKinney 1965).

89 *See, e.g.*, *id.* §§ 50(a), 54(3), 64(11)(b), 206(2).

90 *See, e.g.*, *id.* §§ 113, 130, 183, 184(a).

91 N.Y. TOWN LAW § 133 (McKinney 1965).

92 58 Misc. 2d 780, 296 N.Y.S.2d 619 (Sup. Ct. 1969).

93 N.Y. TOWN LAW § 64(11) (McKinney 1965).

94 N.Y. TOWN LAW § 133 (McKinney 1965).

95 *See* Town of Almond v. Penfold, 58 Misc. 2d 780, 296 N.Y.S.2d 620 (Sup. Ct. 1969). The figures were 260 and 48 for the Hornell and Alfred papers respectively.

> This is so, despite the fact that the newspaper actually employed has a larger circulation in the township, the question being not one of circulation under the circumstances of the particular community, but of statutory requirement established by the legislature, deemed, in its wisdom as fairest for a uniform rule throughout the state.[96]

The provisions of the Town Law evidence little "wisdom" or "uniformity."[97] They do not stand alone. The present designation provisions do not provide a comprehensive, objective, or rational process for reaching people. Until significant changes are made in designation requirements, newspaper publication will remain an inadequate method of disseminating notice information.

II

Guidelines for a Revision

Separate discussion and analysis of content, duration, and designation problems should not obscure the continuous interaction among them. Indeed, if a notice published by a county legislature fails to have an impact on local residents, it may be impossible to isolate a single cause. Small print, excessive length, technical wording, and publication in newspapers of limited circulation each contribute to the failure. Amendments of existing provisions or a thorough revision of the entire system must be the product of detailed legislative examination of both the substantive underpinnings of the statutes and concomitant procedural requirements. Since the expertise of competent and experienced revisers is essential for such a comprehensive task, the New York Law Revision Commission would seem an ideal body to perform the operation.

Regardless of the source of revision, certain guidelines emerge. Those provisions that have become anachronistic in substance or in form should be discarded or rewritten.[98] The remaining provisions

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96 58 Misc. 2d at 783, 296 N.Y.S.2d at 623.

97 In both Burns v. Joyce, 33 Misc. 2d 1088, 228 N.Y.S.2d 532 (Sup. Ct. 1962), and the *Penfold* case, the courts emphasized the legislature's wisdom in drafting notice provisions. One former legislator, however, is of the opinion that legislators do not give careful attention to the statutory details, their concern being only the general one that notice be given in prescribed situations. Interview with Richard Bartlett, in Ithaca, New York, March 10, 1969.

98 *See, e.g.*, N.Y. Alco. Bev. Control Law § 107 (McKinney Supp. 1968); N.Y. County Law § 214 (McKinney Supp. 1968); N.Y. Real Prop. Actions Law § 231 (McKinney Supp. 1968).

could be segregated into categories of like purpose and operation:[99] notices of tax and foreclosure sales, commercial notices, election notices, notices of public hearings, jurisdictional notices in civil and administrative actions, lost and abandoned property notices, and notices disseminating information of general public interest. Once segregated, content, duration, and designation requirements may be assigned to each class according to its own peculiar needs. Underlying every classification should be the principles of brevity, simplicity, uniformity, and objectivity—both to increase administrative efficiency and to ensure maximum public response.

Content will vary among the types of notices, but in general notices should contain only the bare essentials necessary to relate the desired information. For example, notice of a hearing on a proposed ordinance need only contain the date and place of the hearing, a summary of the proposal, and notice that the entire ordinance is available for public inspection. In addition, notices should appear in language readily understandable to those reading them. Long, detailed descriptions of property in metes and bounds, for example, should be replaced by street addresses or by references to well-known landmarks.[100]

None of these simplifications will appreciably improve the present system unless notices are printed in easily readable typeface that attracts the attention of the public. Predictable physical location of notices in the newspaper would further enhance the possibility of response.

Duration requirements will necessarily vary among types of notices; a person about to lose his property by foreclosure should get more extended notice than prospective bidders.[101] Yet the sometimes randomly chosen duration requirements have not reflected differences among statutory purposes. To achieve administrative ease and avoid economic waste, revisers should categorize the appropriate duration requirements needed to achieve informational or jurisdictional ends.[102] Sections clarifying the computation of time periods should become part of the statutory scheme[103] so that technical error may be avoided

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99 All New York statutes are on computer tape. Use of the computer would greatly facilitate the segregation process.

100 Complete descriptions of boundaries are always on file for public inspection.

101 While the average reader does not as a matter of course look for notices affecting his property, the business community is accustomed to seeking opportunities from legal notices. *See* text accompanying note 2 *supra*.

102 Perhaps the greatest complaint of town and county attorneys is that publication in weekly newspapers often delays the actions of their governments. *Correspondence File, Attorneys.*

103 *See, e.g.*, CAL. GOV'T CODE §§ 6800-07 (West 1966).

in the first instance and not discovered only after lengthy, costly litigation.[104]

Provisions regulating the designation of newspapers must also be revised. The type of newspaper suitable for publication should be a function of the readership desired. Notice to the creditors of a dissolved corporation or notices of bond redemptions may likely obtain a better response in legal or mercantile journals; notices of matrimonial or surrogate's proceedings, on the other hand, must appear in newspapers of wider public interest.[105] The number of newspapers selected should also anticipate the desired public response. In cases where a notice stands merely as a matter of public record, one newspaper of wide circulation may be sufficient; in instances where public response is needed, two newspapers may be inadequate.

Circulation requirements should also be added, for publication in small, obscure newspapers cannot possibly reach an appropriate number of readers. Although designation purely on the basis of circulation may be an attractive solution, its implementation is unlikely because of countervailing practical and political considerations. Probably few legislators would favor a system that destroyed patronage entirely and eliminated discretion from the designation process. And certainly, a lack of flexibility and the forced demise of small newspapers may create problems as serious as those presently experienced. Nevertheless, a newspaper's circulation in a locality should be the primary factor in its selection,[106] with optional publication in additional newspapers, at the designator's discretion.

By summarizing and simplifying notices, the cost of individual notices may be reduced. Appearances of concise, understandable, and readable notices in more newspapers is desirable. Thus notices may continue to be published in small newspapers as well as in newspapers of wider circulation. A reallocation of expenditures could convert wasteful costs to a desirable expense—for the publication of notices that give notice.

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104 *See* text accompanying note 21 *supra*.

105 If commercial notices were to appear in newspapers of general interest, the business community could readily find them therein; it is unreasonable, however, to ask the average reader to search legal and mercantile journals for notices affecting him.

106 Newspapers could submit statements of their circulation to the Secretary of State. A comprehensive list could be made and distributed to local governments, executive departments, judges, and others charged with designation responsibilities.