



Montana Legislative Services Division
Legal Services Office

To: Members of the Local Government Interim Committee
From: Julie Johnson, Staff Attorney
Re: SJ 23 Study, Publication of Notice via Electronic Means
Date: November 11, 2021

This memo addresses a question that arose at the September Local Government Interim Committee (LGIC) meeting about Senate Joint Resolution 23, the interim study on Public Notice via Electronic Means, and due process considerations related to the LC 10 bill draft.

Prior to the 2021 session, LC 10 was drafted to allow local governments to provide notice either through a qualifying newspaper or through publication via electronic means, such as on a web site. Ultimately, LC 10 was introduced and passed as a study bill. The initial draft of LC 10, which provides for public notice via electronic means, however, serves as a starting point for the study.

Key provisions of the bill draft were discussed during the September meeting (see Tab 4 of same day materials for September 2021 LGIC meeting). As identified in the research memo by Ms. Henneman, the bill draft of LC 10 attempted two main objectives:

1. Create a definition for a "qualified online publication" to capture the type of publication considered appropriate for electronic public notice.
2. Enable state and local entities to choose a qualified online publication for public notices currently required to be published in a newspaper.

During the LGIC discussion of the SJ 23 study, the question was posed whether publication of notice via electronic means instead of in a local newspaper was sufficient to provide adequate notice for purposes of due process. In speaking with the drafter of LC 10 and after reviewing the bill draft, the question of whether electronic means are sufficient most likely depends on the definition of "qualified online publication." In theory, as long as the online publication is available to at least as many affected people as a newspaper publication would be, due process concerns are allayed. Therefore, defining a "qualified online publication" to capture the type of publication considered appropriate for electronic public notice is critical to ensure that the notice is sufficient.

Next, it is important to note that LC 10 as drafted does not alter service of process and other notice provisions related to civil litigation, which is governed by the Rules of Civil Procedure and codified in Title 25, chapter 20. Those notice provisions are much more stringent and are focused on a specific individual rather than a localized population.

Below is a 1-page primer on Notice and Due Process and related MCA provisions for your edification. If LGIC desires more background and information on due process, I am happy to provide more information as there is no dearth of materials on due process in the United States.

One-Page Primer on Notice and Due Process in Montana

Due process is a foundational concept of democracy and is addressed in both the federal and state constitutions. The United States Constitution, at Art. XIV, sec. 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. II, sec. 17, of the Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."

The Montana Supreme Court has stated that:

Due process requires an opportunity to appear and contest the suspension of a valuable right. Notice requirements exist, in most part, to permit one who is about to be deprived of a property interest the opportunity to challenge the deprivation before it happens.

State v. Pyette, 2007 MT 119, ¶ 21, 337 Mont. 265, ¶ 21, 159 P.3d 232, ¶ 21. The Montana Supreme Court has also recognized that "[t]he United States Supreme Court has established the basic standard for determining whether a notice satisfies due process," which is:

An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. (quoting *Mullane*, 339 U.S. at 314, 70 S. Ct. at 657). More specifically, Montana law recognizes that there are two types of notice. The first is actual notice and the second is constructive notice. Section 1-1-217, MCA, provides:

Notice — actual and constructive. (1) Notice is:

- (a) actual whenever it consists of express information of a fact;
- (b) constructive whenever it is imputed by law.

(2) Each person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting the inquiry, the person might have learned the facts.