

RODEY, DICKASON, SLOAN, AKIN & ROBB, P. A.  
ATTORNEYS AT LAW  
SANTA FE OFFICE  
119 EAST MARCY STREET, SUITE 200  
SANTA FE, NEW MEXICO 87501-2046

P.O. BOX 1357  
SANTA FE, NEW MEXICO 87504-1357  
WWW.RODEY.COM

DIRECT NUMBER: (505) 954-3906  
JBURTON@RODEY.COM

JOHN P. BURTON

TELEPHONE (505) 954-3900  
FACSIMILE (505) 954-3942

August 10, 2017

Honorable John D. Bates  
Senior United States District Judge  
Chair, Advisory Committee on Civil Rules  
United States District Court for the District of Columbia  
E. Barrett Prettyman Courthouse  
333 Constitution Avenue NW  
Washington, DC 20001

Re: Suggested Amendment to Rule 71.1(d)(3)(B)(i)

Dear Judge Bates:

I write to suggest a small but important amendment to Rule 71.1(d)(3)(B)(i).<sup>1</sup>

If certain conditions are met, the rule requires service of a notice directed to a defendant by publication “in a newspaper published in the county where the property is located.” (Emphasis added).

Only if there is no such newspaper does the rule permit publication of the notice in a newspaper “with general circulation” in that county. (Emphasis added).

If there ever was a principled reason for a distinction between a newspaper published in the county and one with general circulation in the county, that reason vanished long ago. Many, if not most authorities have abandoned that distinction, deleting the requirement of publication in a newspaper published in the county and retaining only the standard of publication in a newspaper with general circulation in the county. The Uniform Probate Code provides several examples.

---

<sup>1</sup> I have no condemnation case, pending or contemplated, in any federal court so have nothing to gain personally or professionally. I seek only to simplify and modernize one of the Federal Rules of Civil Procedure, similar to my work with the Uniform Law Commission and the American Law Institute. However, these views are my own.

Several sections of the Probate Code require publication for different purposes in a newspaper with general circulation in the county.<sup>2</sup>

More pertinent, our state rules of civil procedure require publication for service of process in a newspaper with general circulation in the county.<sup>3</sup> This state rule may be used in federal court. Fed. R. Civ. P. 4(e)(1), (h)(1)(A). By making this state rule applicable in federal court proceedings, Rule 4 (e)(1) and 4(h)(1)(A) creates a conflict in this respect with Rule 71.1(d)(3)(B)(i). I do not believe that our state is alone, either in providing for service of process by publication or in providing for publication in a newspaper of general circulation in the county.

Perhaps the best reason for the elimination of the published-in-the-county requirement is that the requirement is an unnecessary complication at best and a trap for the ill-informed or unwary at worst.

It is unnecessary to inquire whether a condemnation judgment would bind one who claims lack of notice following a violation of this requirement or whether defenses might be available to defeat such a claim. It is necessary only to keep in mind that such a claim may be brought years or even decades after the condemnation case was closed.

Recent experience demonstrates that similar claims consume large amounts of judicial resources, even with the use of case-management tools. *See, e.g., T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*<sup>4</sup> That case arose from a quiet title decree entered in 1948 after several defendants were served with process by publication. After the property had increased in value, the successors of two of those defendants sued in 2010 to set aside the decree, alleging that service by publication was improper so that the court lacked jurisdiction over the defendants. After receiving the report of a special master, the district court entered summary judgment against the successors. The New Mexico Court of Appeals reversed the district court and remanded for consideration of defenses to the successors' claims. The New Mexico Supreme Court reversed the Court of Appeals and affirmed the district court in an opinion released for publication in 2017.

The upshot was that a case arising from an allegedly improper publication was finally resolved some 69 years later after occupying the time and attention of three courts for almost seven years.

---

<sup>2</sup> Unif. Probate Code § 1-401(a)(3) (notice of hearing on most petitions) 8 pt. I U.L.A. 82 (2013); *id.* §§ 3-310 (notice of intention to seek informal appointment as personal representative), 3-403(a) (notice of hearing on petition for formal testacy proceedings), 3-801(a) (notice to creditors) 8 pt. II U.L.A. 67, 86, 241 (2013).

<sup>3</sup> Rule 1-004(K)(1) NMRA (applicable to the district courts, which are the state's courts of general jurisdiction).

<sup>4</sup> 2015-NMCA-004, 340 P.3d 1277, *rev'd*, 2017-NMSC-004, 388 P.3d 240.

Rodey, Dickason, Sloan Akin & Robb, P. A.

Honorable John D. Bates  
August 10, 2017  
Page 3

Better to avoid such problems to the extent possible by making this minor adjustment to the rule.

Respectfully submitted,



John P. Burton