CITIES OF THE FOURTH CLASS - Legal publication - what newspaper may be selected for publication under R. S. Mo. 1929, Sec. 7074 when no newspaper published in city.

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November Twenty-Ninth,
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Honorable Sarpy J. Noonan,
City Attorney, City of University City, Missouri,
St. Louis County, Missouri.

Dear Sir:

Request for an opinion has been received from you under date of October 18, 1933, such request being in the following terms:

> "The City of University City is confronted with this situation: There is no legal newspaper within the city; however, there are two legal newspapers in Clayton, St.Louis County, being the city adjoining and under the provisions of Section 7074, R. S. Mo. 1929 we are required to do our legal advertising in "the next nearest newspaper published in the county in which said city is situated." We would appreciate it very much if you would give us your ruling interpreting this Statute.
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> "Are we required literally to do our legal advertising in that newspaper in Clayton whose office is actually nearest University City in metes and bounds, or under this section of the Statute are we required to select a legal newspaper in the next nearest city? It would strike me that this is the more reasonable construction inasmuch as to construe it otherwise we would indeed be in a dilemma, were Clayton to have two newspapers, each an equal distance from University City.
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> "I have made a very thorough search for some Missouri authority covering this point, but up to the present time have been unable to find anything in point. I shall be very grateful to you if at your earliest opportunity you will let me have a ruling on this point.
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> "I would further like to get your thought as to whether or not Section 13775 of the 1931 Acts in any way conflicts with and therefore repeals Section 7074 of the 1929 Statutes."

Revised Statutes of Missouri, 1929, Section 7074, applicable to cities of the fourth class is as follows:

> "Whenever, by the terms of this article, it is provided that an advertisement shall be published in a newspaper published in the city, and there shall, in fact, be no newspaper

published in the city, then said advertisement shall be published in the next nearest newspaper published in the county in which said city is situated."

If the phrase in Section 7074 "next nearest newspaper" is to have any effect at all, it would clearly prohibit publication in a newspaper in some remote part of the county where there were other newspapers published at much nearer points. If, however, such phrase is to be construed literally it might, as you have pointed out, involve a serious difficulty if there were two newspapers published at points equidistant from the city in question, and the problem would arise as to whether or not the word "nearest" means nearest geometrically, i.e. as the crow flies, or whether it would mean nearest by the most direct road or street or other most available avenue of access. If the geometric test were adopted it would not be practical where, for example, the nearest newspaper might be separated from the city in question by a river not spanned by any bridge within several miles. The difficulty with the other standard being adopted literally would be the difficulty of measurement, and also the fact that it would not be in complete harmony with the statutory phrase if such phrase must be construed literally. For these reasons it would seem that a strictly literal construction of the statute might result in confusion and absurdity.

No authority has been found in this state dealing with this problem. However, in Shaw v. Cade, 54 Tex. 307, a similar problem was presented, involving an act of the legislature of April 7, 1874, providing that on the grant of a change of venue the cause shall be removed to some adjoining county, the courthouse of which is nearest the courthouse of the county in which the suit is pending, and the court said that the phrase "nearest courthouse" in the meaning of the statute was not necessarily the one nearest by geometrical measurement, but may be the one most convenient of access and nearest by the usually traveled route, 54 Tex. 311.

Another analogous situation is presented by insurance policies providing that where a loss occurs the insured must procure a certificate under the hand and seal of the magistrate or notary public "nearest" to the place of the fire. In the case of American Central Insurance Co. v. Rothchild, 82 Ill. 166, the court said that the word "nearest" should not be construed literally but only required the procurement of the certificate from a justice or notary public residing in the same locality, 82 Ill. 167. Likewise, in the case of Oswalt v. Hartford Fire Insurance Co., 175 Pa. 427, 34 Atl. 735, involving the same sort of a policy of insurance, the court held that a certificate was sufficient to comply with the policy where the notary executing such certificate lived within a third of a mile of the premises destroyed by the fire, although there was another notary living a few rods nearer, where the insured had no knowledge of the business of such other person, and the latter maintained his office in another locality, and was commissioned and residing in such other

locality. Likewise, in the case of Peltrovitch v. Phoenix Ins. Co., 143 N.Y. 73, 37 N.E. 639, in quoting from the case of McNally v. Phoenix Ins. Co., 137 N.Y. 389, 33 N.E. 475, the court said: "I think that the phrase 'living nearest the place of fire' should not be confined entirely to the food and sleep of the notary, and should take account of the place where he lives officially, and to which by some public sign he invites those who do business with him." The strongest case on the subject is German American Insurance Co. v. Etherton, 25 Neb. 505, 41 N.W. 406, wherein the court held that "the word "nearest" in such an insurance policy should not be construed as employed in such a strict sense as to render necessary a careful and correct measurement of distance, it appearing that an honest effort was made to comply with the policy.

The last case cited and discussed would seem equally applicable to the situation in question here. Of course, if there are two newspapers at distances almost equal from the city in question the safest course would be publication in both of such newspapers, but as this would involve a considerable expense it would seem that the statute would be sufficiently complied with if in the case of two newspapers at an almost identical distance from University City, the City of University City should elect to publish in one or the other of them.

Revised Statutes of Missouri, 1929, Section 13775, as amended by Laws of 1931, page 303 does not in our opinion conflict with or alter the effect of Section 7074, because Section 13775 requires publication in "some" newspaper and not in any newspaper published at any particular geographic location, except that it must be in the confines of the county, and Section 7074 being a special statute, as opposed to 13775 as a general statute, and there not being any conflict in their terms, no reasons are seen why Section 13775 should have any effect on the provisions of 7074 as to where the newspaper must be published in the county to qualify.

It is our opinion that where a city to which Revised Statutes of Missouri, 1929, Section 7074 applies, has no newspaper published therein and where there is a close question as to whether one or another newspaper is the "next nearest newspaper published in the county in which said city is situated" that the city in question should have a right to select one or the other of such newspapers for the publications to which Section 7074 applies.

Very truly yours,

EDWARD H. MILLER,

Assistant Attorney General.

APPROVED:

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Attorney General.

EHM/MG.