



PUBLIC NOTICE HOUSE BILL 7049 Q&A

HERE ARE SOME QUESTIONS AND ANSWERS FOR NEWSPAPERS REGARDING HOUSE BILL 7049 WHICH GOES INTO EFFECT JANUARY 1, 2023

These Q and As are intended to familiarize newspaper ad executives and employees with the new law and provide general assistance and information on the intake and placement of legal ads. Except where specifically required by Florida law, this guidance is not mandatory for newspapers but will hopefully help clarify the law and allow for easier processing and publishing of legal ads. *This is not intended as a substitute for legal advice and it may be prudent to consult with counsel given that the law in some cases is silent or may allow for differing interpretations.*

Q. Has the bill been signed and what is the effective date of this session's bill (HB 7049)?

A. Yes, Governor DeSantis has signed the bill and its effective date is January 1, 2023.

Q. What does the bill do in a nutshell?

A. The bill allows legal ads and public notices to be advertised using any one of the following three options: 1) in a newspaper (free or paid-for) meeting the 10% audience threshold; 2) in a newspaper that holds a periodicals permit; or 3) on a county's publicly accessible website

Q. How is this bill different from last year's (2021 session) compromise bill (HB 35)?

A. HB 7049 rejects much of the compromise reached last year by the legislature and newspaper industry, in particular allowing newspaper-website only notice. The bill reverts the criteria a newspaper must satisfy to be qualified back to the criteria in place before passage of last year's law, with a couple of changes.

Under the latest bill, as noted above, legal ads/public notices may be placed in free newspapers that meet the audience thresholds contained in last year's bill (see below). Further, newspapers that have a periodicals permit at a post office in the county where published can run the notices. The county-website option was also added, as discussed further below.

Q. What about the phase-out periods for the periodicals permit contained in the 2021 compromise bill?

A. That language was struck in the current bill and will no longer be applicable. The periodicals permit will continue to allow a newspaper to qualify to run notices--assuming the other requirements are met.

Q. What are those “other requirements?”

A. They are the same as have been in law for many years. The newspaper:

- Is published at least once a week;
- Has at least 25 percent of its words in English;
- Is available to the public generally for the publication of legal and other notices; and
- Contains information of interest or value to the general public in the affected area.

Q. What about the compromise bill’s requirements that there be no more than 75% ad content, and the continual publication of certain audit/permit information on first 5 pages of the printed paper and homepage?

A. These requirements were deleted in the current bill HB 7049. However, since the bill does not go into effect until January 1, the newspaper should continue to publish this information, and should meet the ad content requirement until that date.

Q. Under the new bill, if I am a newspaper (free or not), and I do not have a periodicals permit, how do I qualify?

A. Your paper will need to meet the audience threshold criteria from last year’s compromise bill, which were retained in latest bill (7049). That is, the newspaper must have an audience consisting of at least 10 percent of the households in the county or municipality, as determined by the most recent decennial census, where the legal or public notice is being published or posted, by calculating the combination of the total of the number of print copies reflecting the day of highest print circulation, of which at least 25 percent of such print copies must be delivered to individuals’ home or business addresses, as certified biennially by a certified independent third-party auditor, and the total number of online unique monthly visitors to the newspaper’s website from within the state, as measured by industry-accepted website analytics software. The newspaper must also be sold, or otherwise available to the public, at no less than 10 publicly accessible outlets. For legal and public notices published by nongovernmental entities, the newspaper’s audience in the county or municipality where the project, property, or other primary subject of the notice is located must meet the 10 percent threshold.

Q. In the meantime (between now and the effective date of the new bill, Jan. 1, 2023), what rules should my free (non-periodicals permit) newspaper follow to qualify?

A. Our advice is that you continue your efforts to qualify under the audience thresholds that are in current law because they are the same as in the new bill. Again, one exception is the continual publication and ad content criteria, which will end when the new law becomes effective.

Q. What about the online requirements for newspapers that have been required for many years, such as uploading to floridapublicnotices.com, and the searchable and archiving and visibility requirements?

A. These long-time on-line requirements still apply to notices that are run in newspapers. The following is a summary of those criteria:

- Each legal notice published in a newspaper must be posted on the newspaper's website on the same day that the printed notice appears in the newspaper, at no additional charge, on a separate webpage with a specific title.
- A link to the legal notices webpage must be on the front page of the newspaper's website, and if there is a specified size and placement required for a printed legal notice, the size and placement of the online notice must optimize its online visibility in keeping with the print requirements.
- The newspaper's website must have a search function and a fee may not be charged, and registration may not be required, for viewing and searching legal notices on the website.
- The newspaper must also place the notice on the FPA's free repository website, where it must be maintained in a searchable archive for 18 months after the first day of posting.

Q. Under the new bill, how long must a newspaper be in existence before it can run legal ads?

A. Two years.

Q. What about the provisions in last year's compromise bill allowing government agencies to publish certain government notices solely on the internet in newspaper websites?

A. That language was deleted in the new bill thereby removing the newspaper website-only option. In its place, the new bill adds a new section (50.0311) allowing governmental agencies to opt to use “publicly accessible websites” in lieu of newspapers for the publication of legal notices.

Q. How does that process work?

A. A “government agency” [county, municipality, school board, or other unit of local government] may opt to use a “publicly accessible website,” defined as the county’s “official website” (or other private website designated by the county), in the county in which it lies to publish legal ads, instead of a newspaper. To do so, the following requirements apply:

- The governmental agency can use this option if doing so would cost less than publishing legal notices in a newspaper.
- The agency using the option must provide annual notice in a newspaper that property owners and residents may receive legal notices from the governmental agency by first-class mail or e-mail upon registering with the agency. The agency must maintain a registry of property owners and residents who request in writing to receive legal notices from the governmental agency by mail or e-mail.
- The bill requires that a link to legal notices published on a publicly accessible website be conspicuously placed on or accessible through a direct link from the: 1) publicly accessible website’s homepage; and 2) homepage of the website of each governmental agency publishing legal notices online.
- Each legal notice so published must be in searchable form and indicate the date of first publication, and a public bid advertisement made by a governmental agency on a publicly accessible website must include a method for accepting electronic bids.
- A form affidavit must be sworn to by the appropriate person that the ad was published on the county/ publicly accessible website.
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Q. You mention above that the law allows the governmental agency to use the county website only if the “cost” of doing so is “less” than the cost of newspaper publication. What is meant by cost? What does it include? What will the local government need to consider in evaluating comparable “costs?”

A. The law does not define “cost” so this term can mean any expenditure of money, time, and labor in replacing newspaper notice with a government website. Agency “costs” will likely include but are not limited to the following:

1. For counties, staff and technology for setting up the “publicly accessible website” or in procuring a third-party contractor to do so. [Similar technology systems by other Florida agencies have met project delays with multi-year efforts at roll-out and increased expenditures.]
2. For counties, maintaining/upgrading the website to reflect rapidly changing technology and providing good user experience and reasonable uptimes.
3. For all agencies including counties, staff time in coordinating with/uploading agency notices to the central county website.
4. For all agencies, preparation and archiving of agency affidavits.
5. For all agencies, the cost of providing first-class mailing. For example, if 10% of the citizens in a larger county (e.g., Pinellas, approx. 1 million) request first class mailing, this would result in postage cost alone of \$58,000 ($\$0.58 \times 100,000$) PLUS staff time and material costs necessary to prepare the paper notice and mail it.
6. For all agencies, costs for training staff on numerous specialized items that MUST be done correctly.
7. Liability cost. Since the government will be responsible for certifying notices and providing publisher affidavits, deficiencies in notice content and form will subject it to potential liability and associated legal costs in defending complaints brought by private parties adversely affected by such mistakes.
8. Project delay costs. Associated project delays due to any required notice deficiencies or errors will add cost.
9. Lost efficiency costs. Providing notice will require communications with parties providing notices, including attorneys/paralegals/businesses that place judicial and other notices. Staff will need to answer questions and coordinate with these private parties regarding placement of notices on the agency site, such as fictitious names, foreclosures, and probate. This will entail costs to the government that the private sector currently shoulders.

The total cost to the government must be broken down in detail, and will likely be substantial, easily reaching hundreds of thousands of dollars. That cost will then need to be compared to the agency’s cost of using private sector newspaper publication.

Further, the agency’s costs will need to be accounted for BEFORE the government decides to pursue the government website option--not only because the new law requires a comparison but also for budgeting purposes. Further, the government should be aware that once it opts in, it will be difficult or impossible for it to reverse course later. For example, if technology, mailing or other costs of the new system increase to an untenable level, reversing course may not be feasible.

For the above reasons, the agency’s comparison analysis of “less cost” vis-a-vis newspaper notice will be crucial.

Q. If the notice is placed on a county website, must it also be uploaded to the FPA aggregate site at floridapublicnotices.com?

A. No, the notice is not required to be uploaded to the site. However, as noted above, this continues to be required if placed in the newspaper. [This is a central downside of the new law because it ends the one-stop availability of all notices at floridapublicnotices.com (see below).]

Q. What about smaller counties—can agencies in these counties use the county website for publication of notices?

A. Yes, but there are additional criteria. Specifically, an agency that has at least 75 percent of its population located in a county with a population of fewer than 160,000 (37 counties) must first hold a public hearing and determine the residents of the governmental agency have sufficient access to the internet by broadband or “other means,” such that access is not “unreasonably restricted.”

Q. Can private parties (as opposed to local governments and agencies) place legal notices on the county websites under the new law without publishing them in the newspaper?

A. There appears to be some confusion about whether privately placed notices can be placed only on a county website. There is statutory language in the various substantive notice sections that indicates the newspaper notice must be used. For example, privately placed notices like storage unit lien notices, fictitious names notices, and probate notice to creditors all require “newspaper” notice. Further, the HB 7040 staff analysis for the most part refers to allowing “governmental agencies” to place their notices on the “publicly accessible [county] websites.” On the other hand, there is some general language in the bill that suggests these notices may be placed on the county website. Overall, we think the more specific criteria and the bill’s intent is that use of government websites is for government/agency notices only. Privately placed notices such as the above should continue to be published in qualifying newspapers and uploaded to the aggregate site, floridapublicnotices.com

Q. What about notices in foreclosure actions?

A. The bill contains language that says notices of sale in foreclosure actions (s. 45.031) can be placed in the newspaper “or” on the county websites. However, attorneys/banks/creditors may hesitate to place such notices solely on a “publicly accessible website” under the new law because of due process concerns. Further, in larger counties (over 1 million as of 2000 census), Florida law requires foreclosure proceeding notices be placed in a “newspaper that has been entered as a periodicals matter at a post office in the county in which the newspaper is published, [and] is published a minimum of 5 days a week.” This more specific language should be followed in these counties. S. 702.035.

Q. Are there downsides for counties opting to set up and use a publicly accessible website for the publishing of legal notices and, similarly, for the government agencies within the counties opting to link to such county websites?

A. We think there are significant downsides to counties and other government agencies, including increased cost of implementation and potential liability below. Elected officials can expect political backlash for increased costs/spending and citizen outcry.

Costs

- There will be implementation costs and the counties will need to start from scratch (whereas private sector newspapers already provide the necessary intake, oversight and proof and publication services). The county website will be the site to which not only county legal ads will be posted but to which all other governmental agencies in the county using website notice will link to. Costs of additional personnel/staff/vendors will need to be budgeted for to carry this out.
- The appropriate government agency official will need to sign a sworn, notarized “proof of publication” that the ad was “published on the publicly accessible website of the specific county” and that the website complies with Chapter 50. This will require time and resources to ensure this is done properly.
- The government agency using the website must provide annual newspaper notice that property owners and residents may receive legal ads from the agency by first class mail or email upon registering their names and address with the agency. The agency must maintain a registry of names, address and email addresses of these persons who have requested in writing that they receive such ads. There is no limit on the number of persons who may request such first class mailing, and future cost is hard to predict.
- The bill says there must be a cost savings for governments to move to use web-only, but what does “cost savings” mean? Further, how can a local government know such “cost savings” exist before it proceeds with the website? What if costs of the first-class mailing and affidavit preparation—services required of the gov. agency/county--in a few months or more rise to an untenable level? At that point, there will be no going back because there is no mechanism to unwind the decision.

Potential Liability

- If the county errs in the timing, format or content of the legal ad, is there potential liability for a party that is damaged as a result of those errors? If the sworn affidavit does not reflect what is actually run, is there liability?

Q. What are the downsides to the public if a county opts to set up a website for its use and other government agencies?

A. There will be more conflicts of interest and confusion and less transparency:

- The county websites will result in a direct conflict of interest by the county officials. The county or their vendors will be directly overseeing the timing, placement, and content of the notice of the county's own activities, a situation that brings with it the potential of abuse. If a scheduled public notice is not published or contains false information, the newspaper is more likely to catch the mistake.
- The government websites will reduce transparency and may create confusion among the public. The aggregate floridapublicnotices.com site will no longer be a free central repository to citizens for all the notices (with the added benefit of free email pushouts). In its place will be a patchwork of notices strewn across 67 different county websites across the state. The public will suffer because official actions will surely be missed, ranging from increased taxes, school board policies, medical marijuana facilities, and a host of other actions that the public will want to know about and provide input on. Such websites may be used to lower the visibility of controversial actions. Far from furthering Florida's longstanding tradition of government in the sunshine, the websites will be akin to a total eclipse of the sun.
- There will be confusion among the public about where to find the notices in a particular county with multiple agencies. Some may retain newspaper notice and others may use the county site. There will be no central aggregate site such as floridapublicnotices.com because that site will only aggregate newspaper legal ads.
- As noted, smaller counties will need to have a hearing on internet access. The standards are vague, however. Further, it may result in confusion by the public because some agencies within the county may vote to use the county website and others may not.

Q. Now that the bill has been signed, what can FPA members do to help keep legal notices in the local paper where they belong and not on government websites?

A. Before choosing the county website option, officials should be clear about the various downsides they will face. These include additional costs by the government entity including additional staffing and procurement, first class mailing, and preparing affidavits, as well as the added liability and possible project delays for notices that may be deficient or untimely. Members should communicate these points to officials when the opportunity arises. They should be aware of the downside to the public. Hopefully, once they have the information, the answer to their question "what's in it for me?" will be more cost and liability risk, public complaints, and related "headaches."

Finally, it is important for members to continue providing excellent customer service to their government clients regarding the intake, pricing, and placement of legal ads. The ease by which government employees can fulfill their notice obligations will go a long way to keep counties and cities coming back to newspapers. Use and nurture your relationships with local government staff and timely address any problems or issues they might raise. Find and use the most efficient, accessible, and transparent digital platform, including those created by FPA's technology partners. This will not only help preserve the notices where they belong--in the local paper--but also keep citizens better apprised of what city hall is doing with their tax dollars.

