

Opinion No. 69-125

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BY: OPINION OF JAMES A. MALONEY, Attorney General Jeff Bingaman, Assistant Attorney General

TO: Ernestine D. Evans, Secretary of State Legislative-Executive Building, Santa Fe, New Mexico 87501

QUESTIONS

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In publishing the full text of the proposed new Constitution in at least one newspaper in every county in the State as provided in Article XIX, Section 1, of the New Mexico Constitution, would it be permissible to have the text printed as a removable insert similar to the Sunday supplement type inserts and advertising flyers included in newspapers?

CONCLUSION

See Analysis.

OPINION

{*201} ANALYSIS

In the recent case of **State of New Mexico ex rel., Constitutional Convention v. Ernestine D. Evans, Secretary of State**, (Docket No. 8915, issued October 20, 1969) the New Mexico Supreme Court made two decisions which have bearing on the question presented here. First, the Court held that the Legislature was within its authority in establishing procedures to be followed in publishing the new constitution and conducting the election for its ratification. Specifically, the Court pointed to Section 3-16-1 and Section 3-16-4, N.M.S.A., 1953 Compilation. In the Court's view these two statutes quite properly require that the submission and publication of a new constitution be governed by the election code in the same manner as the submission and publication of amendments. Second, the Court pointed to the language in Section 3-16-4, N.M.S.A., 1953 Compilation to reach the conclusion that the publication provisions in Article XIX, Section 1 of the New Mexico Constitution are applicable to the publication of a new constitution.

In light of the Court's holding that both the election code and the publication requirements in Article XIX, Section 1 of the New Mexico Constitution must be followed in the publication of the new constitution, we must determine whether either of these

authorities prohibits publication of the new constitution in the manner contemplated in this opinion request.

Section 3-16-4, N.M.S.A., 1953 Compilation provides for publication in the following language:

"Upon receipt of the certified, proposed constitutional amendment or other question, the county clerk shall include it in the proclamation to be issued and shall publish the full text of each proposed constitutional amendment or other question in accordance {*202} with the Constitution of New Mexico."

This language requires the publication of the full text together **with** the proclamation. No other provision of the election code seems to add requirements as to the form or manner of publication.

In the words of the New Mexico Supreme Court, "The election code requires compliance with the publication provisions of Article XIX, Section 1, New Mexico Constitution, when the **question** of the adoption of the new constitution is published." Do these constitutional publication provisions prohibit publication in the manner contemplated here?

The New Mexico Constitution provides in Article XIX, Section 1:

"The Secretary of State shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the state for their approval or rejection; and the said amendment or amendments shall be voted upon at the next regular election held in said state after the adjournment of the legislature proposing such amendment or amendments, or at such special election to be held not less than six months after the adjournment of said legislature, at such time as said legislature may by law provide. If the same be ratified by a majority of the electors voting thereon, such amendment or amendments shall become part of this constitution. . . ."

There is no court interpretation of this provision to determine what manner of publication is required. Likewise, this office has not had occasion to address itself to this question. However, the California Courts have interpreted a statute similar to our constitutional publication provisions and in doing so have made a distinction which we think would be applicable here as well.

In the case of **Penaat v. Terwilliger**, 23 Cal. 2d 865, 147 P.2d 552, the California Supreme Court held that a statutory requirement that delinquent tax lists be published

"in some newspaper of general circulation" was met with the publication of the lists in a supplement. The Court stated:

"Since there is no question that the publications were newspapers of general circulation, and since the sections in which the delinquent tax lists appeared were integral parts of the newspapers for the days in question, such lists were published in compliance with the statutory requirements."

However, the Court distinguished this situation from that presented in **Clayton v. Schultz**, 22 Cal. App. 2d 72, 70 P.2d 512, where the Court held that publication was not accomplished when the lists were "separately bound and covered and . . . not in anywise connected with the main part of the paper."

Based upon this authority it is our opinion that publication of the constitution and proclamation in the form of an insert would be subject to legal attacks. The distinction which must be maintained here is between "publishing" in a newspaper and "distributing" in a newspaper. In order to insure that the material is "published in the newspaper" we advised that it be published either as part of a regular section of the newspaper or as a separate section. If published as a separate section, the section should contain the running head of the newspaper, {*203} the date of publication, and some designation to indicate that it is a section of that day's newspaper.