OUT OF SERVICE

A CALL TO FIX THE BROKEN PROCESS SERVICE INDUSTRY

A Report By The

New York City Bar Association
Committee on New York City Civil Court
Committee on Consumer Affairs

APRIL 2010

OUT OF SERVICE

A CALL TO FIX THE BROKEN PROCESS SERVICE INDUSTRY

Executive Summary

There is a crisis in the process service industry in New York City. In 2009, 66% of the 241,195 consumer debt cases initiated resulted in default judgments, often after "sewer service."[1] As a result, each year tens of thousands of New York City residents are deprived of their due process right to be heard before judgments are issued against them, resulting in frozen bank accounts, ruined credit ratings, and other devastating consequences. Hearings held in 2008 by the New York City Department of Consumer Affairs and well publicized actions in 2009 by the New York State Attorney General, including a proceeding to overturn 100,000 default judgments due to questionable service, highlight the persistent nature of the process service debacle in New York.

The New York City Bar Association has been reviewing the process server industry for over two years and developed a number of proposed changes to alleviate this crisis. We are pleased some of these changes have recently been adopted into law by the City Council. Some of our proposals can be accomplished without changes in the law, while others will require additional statutory or regulatory changes at the local or state level. Still others make structural changes in the industry to eliminate the incentive for process servers to cut corners. The following is a summary of some of our recommendations:

1 "Sewer service" is the practice of not notifying people that they have been sued. The "service" of service is so improper that the process server may just as well have thrown the papers down the sewer.

- Increased enforcement by the New York City Department of Consumer Affairs (DCA), and an annual report by DCA on the industry and compliance with the law;

- A more active role by the judiciary in ensuring that process servers abide by the law, including creation of a standing task force on process service by the Court system and DCA;

- Require law firms that file consumer debt lawsuits to exercise due diligence in determining the accuracy of a defendant's address;

- Improve wages and labor enforcement for process servers to eliminate the incentive to cut corners and violate the law; and

- Require continuing legal education as a condition of license renewal.

Four of our original proposals have just been adopted into law:

- Require that applicants for a process service license pass a qualifying exam;

- Enact a bonding requirement for process servers and process serving agencies;

- Implement a global positioning system (GPS) requirement to verify process servers' locations;

- Make process service companies accountable for the conduct of process servers they hire as employees or independent contractors.

The GPS and bonding requirements have a limited exception for individual process servers. In addition, the law requires that process serving records be maintained for seven years in electronic form. The passage of this law is a positive step, and we hope to see timely progress toward realization of the other recommendations in this report as well.

Key to a resolution of this crisis is for each of the players – regulatory authorities, the judiciary, the bar and the debt-buying and process-service industries – to take action

to achieve lasting and permanent reforms so that sewer service is eliminated once and for all in consumer debt cases in New York City.

I. Introduction

The high default rate in consumer debt cases in New York City Civil Court, caused in large part by unlawful service of process, is nothing short of a miscarriage of justice. In 2008 alone, nearly 300,000 consumer credit cases were filed in New York City Civil Court.[2] Seventy-nine percent of the cases filed in 2008 resulted in default judgments against consumer defendants.[3] This pervasive problem received attention in June 2008 when the New York City Department of Consumer Affairs (DCA) held a public hearing on process service. In 2009, 241,195 consumer credit cases were filed, and 66 percent of the cases resulted in default judgments.[4] A major contributing factor to this astoundingly high default rate is that countless consumer defendants are never served with a summons and complaint, and, as a result, are never notified that there is a lawsuit pending against them. The Office of the New York Attorney General shed light on this problem in 2009 when it filed criminal fraud charges against a Long Island-based process service company, American Legal Process, and its owner for doctoring records and filing thousands of false affidavits of service in debt collection lawsuits,[5] and when it sued 35

2 Response to FOIL Request to New York Office of Court Administration, Nov. 24, 2009.
3 *Id*.
4 Presentation by Laurie Milder, OCA representative, to the Civil Court Committee of the New York City Bar Association on March 24, 2010 ("Milder Presentation").
5 David Caruso, The Associated Press, *Court Papers Went Undelivered; Process Server Faces Charges*, N.Y. Law Journal, April 15, 2009, at 1:4. ALP's CEO and president, William Singler, pleaded guilty to scheme to defraud in the first degree on January 15, 2010 and is awaiting sentencing. *See* Press Release, Office of Attorney General, Cuomo Announces Guilty Plea of Process Server Company Owner Who Denied Thousands of New Yorkers Their Day in Court, Jan. 15, 2010, *available at* http://www.ag.ny.gov/media_center/2010/jan/jan15a_10.html.

law firms and two debt collection offices to vacate an estimated 100,000 default judgments entered against New York consumers based on improper service of process.[6] Individuals who are not notified of lawsuits pending against them are deprived of basic due process. Without notice and an opportunity to be heard, judicial proceedings are a sham, depriving defendants of the opportunity to appear in court and assert defenses in proceedings commenced against them. Moreover, when a defendant does not appear in a consumer debt action, a plaintiff can win a default judgment by simply submitting an application to the clerk, without having to establish its *prima facie* case. The real world consequence of this basic due process violation is that plaintiffs in consumer debt cases can obtain default judgments that throw the lives of consumer debtors into chaos. Here are three client stories, supplied by MFY Legal Services, of persons who were the victims of improper service:

- Roberta G was never served with the summons and complaint in a debt buyer's lawsuit. She only discovered she had been sued when she received notice that a default judgment had been entered against her. According to a sworn affidavit of service, the process server served Ms. G by leaving the summons and complaint with a co-tenant in her Brooklyn apartment on a Friday afternoon, and thereafter mailing her the court papers. However, Ms. G lives alone, and she knows with certainty that she was home on the date she was purportedly served, as that day was her 60th birthday. Ms. G had many defenses to the lawsuit, and had she known about the case when it was filed, it is likely that she would have been able to get it dismissed. Instead, she first had to undo the

6 Press Release, Office of Attorney General, Attorney General Cuomo Sues to Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers in Next Stage of Debt Collection Investigation, July 23, 2009, *available at* http://www.oag.state.ny.us/media_center/2009/july/july23a_09.html. As of the publication of this report, the case is still pending.

judgment with the help of an attorney. Until the case was finally over, Ms. G, who subsists on SSI and was not aware that her income is exempt from collection, worried constantly that the plaintiff would enforce the judgment against her and, despite her meager income, considered making payments to avoid going to court on her own.

- Dawny C, who was sued by a debt buyer and allegedly served at an address in Queens she had not lived at in seven years, appeared *pro se* in Queens Civil Court and requested a hearing so she could prove she had not been served. Ms. C provided the court with proof of her current address in Brooklyn, including a bank account statement, a cell phone bill, and a rent receipt indicating that she had been living at her Brooklyn address for the entire previous year. The first time she appeared in court for the traverse hearing, it was adjourned because the process server failed to appear. On the adjourn date, despite the fact that the process server was present and Ms. C had substantial proof that she had not been served at a valid address, plaintiff's counsel and the court convinced her to forego the hearing and settle her supposed debt. Thereafter, Ms. C struggled to make payments on a debt she was not sure she owed out of her unemployment insurance benefits. Ms. C felt intimidated by the court process and was unsure of her rights. Eventually she obtained free legal counsel, successfully vacated the stipulation and was able to have the case dismissed.

- Lemar K, a city employee, found out he had been sued on a credit card debt he had paid off long ago when he was denied access to his bank account, which was restrained pursuant to a judgment. Mr. K was charged a fee by his bank and subsequently took several days off from work to appear in court, in an attempt to vacate the default judgment and fight the case on his own. When he reviewed the court file, he discovered

that a process server had purportedly served a nonexistent male relative in Brooklyn at his mother's address. Mr. K's mother lived alone, and Mr. K does not have any male relatives with the name or fitting the description set forth in the affidavit of service. In addition, at the time of the purported service, Mr. K lived in Pennsylvania. It was devastating for Mr. K when his bank account was frozen, as his salary was directly deposited into the account. Moreover, Mr. K found it overwhelming to navigate the court system on his own. Without help from a free legal services attorney, it is doubtful that Mr. K could have resolved this lawsuit.

These are the stories of only three persons harmed by sewer service: tens of thousands of individuals' lives are upended by unlawful service of process each year. In New York State, creditors' attorneys can use judgments to freeze and seize the contents of individuals' bank accounts, garnish wages, and seize personal property.[7] When people of limited means, in particular, lose access to their bank accounts or a portion of their income, they are unable to pay bills and rent, purchase food or medicine, or pay for transportation essential to their jobs. For individuals who live paycheck to paycheck, judgment enforcement can result in eviction and other life-altering calamities. Further, a default judgment negatively impacts a person's credit rating, affecting that individual's ability to obtain housing, loans and employment. Given these dire consequences, it is essential that debtor defendants be notified of lawsuits filed against them.

7 CPLR Article 52. The Exempt Income Protection Act, which took effect on January 1, 2009, protects a threshold amount of exempt income in a bank account from being restrained. Consumer advocates report that in some instances, however, judgment debtors are still experiencing difficulties with bank accounts being improperly restrained.

Many laws govern the service of process in New York. In addition, process servers and process serving companies are licensed by DCA, which has promulgated rules and regulations governing process service. Despite these laws and the agency's enforcement activities, rampant due process deficiencies in consumer debt cases continue. This report examines the crisis of sewer service in consumer debt litigation and proposes remedies to ensure that the due process rights of consumer debtors are not routinely violated.

II. Scope of Problem

A. A History of Attempts to Reform the Industry That Have Fallen Short

Sewer service is a perennial problem in New York, and hand-wringing on this topic is an all too familiar refrain. Over the decades, process servers have been the focus of countless surveys, reports, judicial decisions, and law enforcement actions.

In 1968, the United States Attorney's Office for the Southern District of New York conducted an investigation that resulted in the indictment of several process servers and principals of process serving agencies, as well as an attorney, for the systemic practice of filing false affidavits of service.[8] The Second Circuit, in *United States v. Wiseman*, later affirmed the convictions of two process servers.[9] As recounted in a Columbia Law Review article by the lead investigator,[10] the U.S. Attorney's investigation was spurred by studies and calls for action in the mid-1960s by groups including the

8 Patricia M. Hynes, President of the Association of the Bar of the City of New York, was actively involved in this litigation.
9 445 F.2d 792 (2nd Cir. 1971), *cert. denied*, 404 U.S. 967 (1971).
10 Frank M. Tuerkheimer, Service of Process in New York City: A Proposed End to Unregulated Criminality, 72 Colum. L. Rev. 847 (1972).

Congress for Racial Equality, The Legal Aid Society, and Mobilization for Youth. These activities and the attention drawn to process serving abuses led to the 1969 enactment of a licensing requirement in New York City for process servers.[11]

In 1986, the New York Attorney General's Office, DCA, and the New York City Department of Investigations issued a comprehensive report ("Joint Report on Sewer Service") on process servers and announced the indictment of five process servers for filing false affidavits of service.[12] The report found convincing evidence of "pervasive, wanton disregard for the law by the private process server industry."[13] In the wake of the report, both the State and City strengthened their record-keeping requirements for process servers.

In a 1987 decision, *Barr v. Dept. of Consumer Affairs*, the Court of Appeals upheld the license revocation of a process server for failing to keep accurate and complete records and said:

> . . . Often associated with consumer debt collection and landlord-tenant litigation, questionable service practices have their greatest impact on those who are poor and least capable of obtaining relief from the consequences of an improperly imposed default judgment. Accordingly, the Department of Consumer Affairs must depend on the accurate record-keeping practices of its licensees as a means of monitoring the industry and uncovering wrongful practices . . . [14]

11 *Id.*
12 N.Y. Attorney General, N.Y. City Dept. of Consumer Affairs, N.Y. City Dept. of Investigation, A Joint Investigative Report into the Practice of Sewer Service in New York City (1986) ("Joint Report on Sewer Service").
13 *Id.* at 21.
14 70 N.Y.2d 821 (1987).

A front-page *New York Law Journal* article in 1996 reported on DCA's revocation of the license of a process server who claimed to have served housing court papers upon a Brooklyn resident who had actually been in Puerto Rico at the time.[15]

In 2008, MFY Legal Services, Inc.[16] issued a report detailing the pervasive plague of improper service in consumer debt collection cases in the New York City Civil Court.[17] The report concluded that the appearance rate by debtor defendants in lawsuits initiated by the top seven debt collection law firms was only 10 percent.[18]

Despite more than 40 years of periodic attention to deficiencies in the process server industry, sewer service is alive and well. The Attorney General's recent indictments and lawsuits underscore the need for profound reform in this industry, as opposed to episodic media coverage and reports that do not produce lasting results. We hope that the current attention being paid to improper service in consumer debt cases will, at long last, lead to fundamental change in this arena.

B. New York City Civil Court

Due in large part to sewer service, the default rate has always been high in Civil Court cases. The 1968 investigation by the U.S. Attorney's Office found that at least half of all default judgments entered in New York County Civil Court were based on false affidavits of service.[19] According to the 1986 Joint Report on Sewer Service, there were

15 Matthew Goldstein, *Process Server's License Revoked by Consumer Agency for Fraud*, N.Y. Law Journal, Feb. 7, 1996, at 1.
16 Formerly Mobilization for Youth.
17 MFY Legal Services, Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York 4 (June 2008) ("Justice Disserved"), *available at* http://www.mfy.org/Justice_Disserved.pdf.
18 *Id*. at 4.
19 Tuerkheimer, *supra* note 10, at 849.

approximately 140,000 default judgments in 250,202 cases filed in the Civil Court in 1985 (a 56 percent default rate).[20] The report concluded that "an alarmingly high number of those default judgments were entered after 'sewer service.'"[21]

In recent years, the upsurge in consumer case filings, associated with the explosive growth in debt buying, has overwhelmed the court system. New York City Civil Court filings have tripled since 2001, and consumer credit cases alone totaled 298,326 in 2008.[22] However, only 11 percent of *pro se* defendants answered in these cases and the overall rate of default judgments climbed to 79 percent in 2008.[23] (The remaining 11 percent of cases were withdrawn or abandoned by the plaintiff.)[24] In 2009, consumer credit cases totaled 241,195, and the default rate was 66%.[25] The 2009 investigation by the Attorney General's office estimated that over 100,000 default judgments were entered in a 22-month period statewide because of sewer service conducted by *one process serving company*.

Recognizing the gravity of the problem, the Civil Court responded in April 2008 by implementing its own notice requirement. New York City Civil Court Rule 208.6(h) requires a plaintiff in a consumer credit lawsuit to submit to the court a one-page notice addressed to the defendant notifying her that she is being sued. Court personnel mail the stamped notice to the defendant. The number of answers filed in consumer debt cases has increased since the notice requirement was implemented, with some defendants

20 Joint Report on Sewer Service, *supra* note 12, at 4-5.
21 *Id.*
22 Nov. 24, 2009 FOIL request, *supra* note 2.
23 *Id*.
24 *Id*. Due to rounding, these numbers do not add up to precisely 100 percent.
25 See Milder Presentation, *supra* note 4.

reporting that their only notice of a lawsuit was the notice mailed by the court.[26] In addition, many notices have been returned to the clerk's office as undeliverable by the postal system, despite the fact that process servers claim under oath to have served the defendants at the listed addresses.[27]

Despite this positive step taken by the Court, it appears that many Civil Court judges place a low priority on a defendant's right to be properly served. Notice of a lawsuit is a basic due process right which should be championed by the courts. Practitioners who handle consumer debt matters in the Civil Court report that judges often dissuade defendants from asserting their right to challenge service and instead, pressure defendants to settle their cases.[28] In fact, as reported by consumer advocates across the city, many civil court judges appear to routinely require defendants to waive the defense of personal jurisdiction as a prerequisite to vacatur of a default judgment based on improper service.[29] Further, very few traverse hearings are held in the five boroughs,[30] providing little deterrence to process servers who flout the law.

26 Response to FOIL Request to New York Office of Court Administration, September 4, 2009.
27 *Id*. When a notice is returned as undeliverable, the court will not enter a default judgment unless the defendant's address on the notice matches the address on record with the New York State Department of Motor Vehicles. *See* Chief Clerk's Memorandum (CCM) 182, effective date 4/21/09.
28 *See* Testimony of Claudia Wilner Before the New York City Department of Consumer Affairs, Exploratory Public Hearing on Process Server Practices in New York City, June 13, 2008 ("DCA Process Server Hearing Transcript" or "Transcript"), at 51-52; Testimony of Carl Callender, Transcript, at 70-71.
29 In the process of preparing this report, the Committees have gathered examples of such orders in which the waiver of service of process is preprinted in a standard form.
30 Justice Disserved, *supra* note 17, at 5.

C. The Debt Buying Industry

The growth of the debt buying industry in recent years has contributed significantly to the dramatic increase in consumer credit filings in the courts.[31] Debt-buying companies purchase charged-off debts (accounts that a creditor writes off as bad debt) from original creditors in bulk, and attempt to collect the full amount purportedly owed. Debt buyers typically pay five percent of the amount owed on delinquent accounts, and often less, depending on the desirability of the accounts.[32] Nationally, annual revenues for the debt buying industry are expected to reach $6.2 billion by 2011.[33]

Typically debt buyers hire outside debt collectors to attempt to collect on their debt portfolio, and retain debt collection law firms to file suit and obtain judgments against consumer debtors.[34] Consumer debt collection is a high-volume business, dominated by a few law firms. In New York City, seven debt collection firms prosecute 30 percent of all debt collection cases.[35] Whether due to misfeasance or malfeasance, collectors often sue consumer debtors at old addresses and fail to investigate whether those addresses are correct, despite the prevalence of technology that makes checking addresses as easy as the click of a few computer keys. The consumer debt collection industry paradigm, premised on buying accounts, filing cases, and paying paltry sums for

31 Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change, A Workshop Report 3 (February 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf ("FTC Report"); National Consumer Law Center, *Fair Debt Collection* 7-10 (6th ed. 2008).
32 FTC Report, *supra* note 31, at 4.
33 *Id*. at 14.
34 FTC Report, *supra* note 31. at 3.
35 Justice Disserved, *supra* note 17, at 4.

process service in bulk, results in sloppy, mistake-ridden litigation at the expense of defendants' rights.[36]

How complicit debt collection law firms are in the practice of sewer service is an open question, but as far back as 1972, it was recognized that law firms were well aware of the problem and willing to overlook it. "Several facts lead to the inescapable conclusion that sewer service could not be as pervasive as it is without plaintiffs' attorneys being aware of it . . . . a relatively small number of law firms account for a very high percentage of default judgments."[37]

The New York Attorney General has recognized the role that debt collection law firms play in the use of sewer service. In his suit to vacate more than 100,000 default judgments, the Attorney General named as defendants 35 law firms which had used one process serving company supplying false affidavits to obtain default judgments against consumers. In the prosecution of American Legal Process (ALP), the Attorney General accused one of the debt collection law firms that hired ALP to serve thousands of summonses of complicity in denying New Yorkers notice of lawsuits against them, and described the acts as "corrupting our legal system."[38] Attorney General Cuomo noted, "Law firms cannot turn a blind eye to abuses perpetrated on their behalf."[39]

D. Process Serving Laws and Practices

1. Laws

The laws governing service of process and process server licensing include the New York Civil Practice Law and Rules (CPLR), the Rules of the City of New York, and

36 *Fair Debt Collection*, *supra* note 31, at 7-10.
37 Tuerkheimer, *supra* note 10, at 865.
38 Press Release, Office of Attorney General, Attorney General Cuomo Announces Arrest of Long Island Business Owner for Denying Thousands of New Yorkers Their Day in Court, April 14, 2009, *available at* http://www.oag.state.ny.us/media_center/2009/apr/apr14a_09.html.
39 *Id*.

the New York City Administrative Code. CPLR § 308 requires service to be effected on a defendant personally, and, if that is not possible, by substituted service. Substituted service entails serving a person of suitable age and discretion at the defendant's home or business and mailing the defendant a copy of the summons. Alternatively, where service cannot be made by either personal delivery or substituted service with due diligence and a sufficient number of attempts on different dates and times have been made, a defendant may be served by affixing the summons to the door of her home or business and mailing a copy to the defendant at her last known residence or actual place of business. After service is completed, the process server must sign an affidavit of service and file it with the court.[40]

In New York City, process servers must be licensed by DCA. DCA currently licenses approximately 1,832 process servers and 127 process serving companies.[41] Administrative Code § 20-403 sets forth the licensing requirements for process servers: applicants are required to fill out a simple form, provide a piece of acceptable identification and current photograph, pay a fee of $340 for a two-year license, certify that they do not owe outstanding child support, and provide fingerprints for evaluation by the New York State Division of Criminal Justice Services.[42]

The record-keeping rules regarding process servers are found in Title 6 of the Rules of the City of New York, §§ 2-233 through 2-238. They require that each individual licensee keep records in compliance with Section 89-c of the New York State

40 CPLR § 308.
41 FOIL Response from Department of Consumer Affairs, June 24, 2009.
42 A note on the license application checklist states that a conviction will not necessarily prevent a person from being granted a license, but that failure to reveal a conviction can constitute grounds for denial.

General Business Law.[43] The rules specify the information that process servers must keep, and require that the process server keep a legible record of all service effectuated in chronological order in a bound book, commonly called a "logbook," for a period of two years from the date of service.[44] If the process server is employed, copies of such records must also be kept at the employer's office for the same time period. The logbook must include the title of all the actions or proceedings in which service was effected; physical descriptions and names of the persons served, if known; dates and time of all service attempts made and completed; addresses where service was effected; the nature of the papers served; the court where the papers are returnable; and the index number of the case.[45] In New York City, if conspicuous place service is utilized pursuant to CPLR § 308(4) or Real Property Actions and Proceedings Law (RPAPL) § 735(1), the process server must also note the color of the door upon which any papers were affixed.[46] The rules also require that when process servers are the subject of a traverse hearing challenging service of process, they must report this development to DCA.[47] New legislation passed by City Council on March 25, 2010, requires that process serving records be maintained for seven years in electronic form and that employment records be maintained for three years.

43 Section 89-c of the General Business Law was redesignated General Business Law Sections 89-f-89-v L.1992,c.336, eff July 1,1993.
44 N.Y. GBL § 89-gg requires that process service records be maintained for a period of *three* years.
45 N.Y. GBL §§ 89-u, 89-cc.
46 N.Y. GBL §89-cc.
47 6 RCNY § 2-236.

Pay

In consumer credit cases, process service contracts are often entered into in bulk by process serving companies and debt collection law firms suing on behalf of original creditors and debt buyers.[48] The process-serving companies in turn use individual process servers, typically independent contractors, to carry out the actual service. Many such process servers are not paid on an hourly basis that meets or exceeds minimum wage, but are instead paid on a piecework basis, often receiving only a paltry $3-$6 per item of service.[49] Moreover, many process servers are not paid at all if they fail to effect service.[50] The 1986 Joint Report indicates that the industry average pay for process service at that time was $3 per completed service.[51] The same report states that law firms paid the process serving agencies a market rate of approximately $6-12 for each process served.[52] In consumer credit cases, the current industry standard is for process serving companies to charge their customers as little as $13-$15 for service of a pleading.[53] This contrasts with prevailing rates of $35-$45 per item served for service of process in other types of litigation, such as housing court proceedings, according to an informal survey by the authors of this report. Process servers and process serving companies that do not engage in consumer debt collection tend to pay their servers more, ranging from $20-$50

48 *See, e.g.*, Testimony of Douglas Preston Riley, DCA Process Server Hearing Transcript, at 188-189.
49 *See, e.g.*, Testimony of Alex Shafran, DCA Process Server Hearing Transcript, at 109; Testimony of Jay Brodsky, Transcript, at 134; Testimony of Chris Rossi, Transcript, at 198; Testimony of Bob Gulinello, Transcript, at 207.
50 *See, e.g.*, Testimony of Samson Newman, DCA Process Server Hearing Transcript, at 158.
51 Joint Report on Sewer Service, *supra* note 12, at 2, 3-4.
52 *Id*. at 3.
53 *See, e.g.*, Testimony of Jay Brodsky, DCA Process Server Hearing Transcript, at 137.

per hour or instrument.[54] The substandard pay for process service in consumer debt cases undermines the incentive for process servers to properly serve papers.

In comparison, the civil law enforcement branch of the New York City Sheriff's Office handles service of process for a fee of $15 plus a minimum $27 mileage per location, for a standard minimum amount of $42.[55] If service by the Sheriff is requested at multiple locations (for example, at the defendant's home and work addresses), there is an additional $25 service fee for each additional location.[56] Individual deputy sheriffs who work for the Sheriff's office are salaried employees of the City of New York and their compensation is not affected by the volume of summonses served (except to the extent that they receive overtime compensation).

2. Testing and Training

The recent City Council legislation requires testing, but does not require continuing education for process servers. Under the prior law, there was no requirement that process servers have training or knowledge of laws and regulations governing service of process. Many process servers "learn the ropes" from their peers, who themselves were never formally educated about process serving and may serve as poor role models.

The industry itself recognizes that education of process servers is necessary. At the 2008 DCA public hearing, almost every speaker from the process server industry stated that education is needed:

---

54 *See, e.g.*, Testimony of Harlan Parker, DCA Process Server Hearing Transcript, at 170; Testimony of Douglas Preston Riley, DCA Process Server Hearing Transcript, at 187.

55 CPLR § 8011(h). See also http://www.nyc.gov/html/dof/html/services/services_enforcement_serve.shtml (last visited Nov. 22, 2009).

56 *Id.*

- Samson Newman, Aetna Judicial Service, testified: "You put us [process server companies] at a disadvantage when you put a process server out there and license him, and you expect us to believe that he knows how to serve papers."[57]

- Thomas Dundas, President of Process Service Plus, Inc., testified that "if you lost your job, you run down to Consumer Affairs, pay your $340, and $75 for fingerprints, and you're in the industry. You're out there, working. We should have some kind of certification, and it should be mandatory when you renew your license, you're certified every two years."[58]

- Larry Yellon, Vice President of New York State Professional Process Servers Association and a member of the Board of Directors of National Association of Professional Process Servers, testified: "Our association has strived to improve our profession, and we feel that continuing education is a necessary ingredient."[59]

- Jillina Kwiatkowski, President of New York State Process Servers Association, has been a process server for 10 years. She testified that she "would like to see the requirement in New York State to make all process servers have to take a certification course. It's only right. Most every other industry has a certification process."[60]

- John Perez, President of New Jersey Professional Process Servers Association and Co-Chair of the Education Committee for the New York State Professional Process Servers Association, testified: "my recommendation to the Commissioner is require education of process servers. Don't merely have them pass a

57 Testimony of Samson Newman, DCA Process Server Hearing Transcript, at 151.
58 Testimony of Thomas Dundas, DCA Process Server Hearing Transcript, at 160.
59 Testimony of Larry Yellon, DCA Process Server Hearing Transcript, at 127.
60 Testimony of Jillina Kwiatkowski, DCA Process Server Hearing Transcript, at 123.

criminal record check, pay a fee that is just tantamount to a fund-raising, and require nothing else, and perhaps an audit every now and then. I think education is the core issue."[61]

3. Enforcement

The Department of Consumer Affairs is charged with the maintenance of standards of honesty, integrity and fair dealing among persons engaging in licensed activities.[62] The agency may issue subpoenas and conduct investigations.[63] After an administrative hearing, DCA has jurisdiction to suspend, revoke, deny or refuse to renew a process server's license for failure to follow the law and rules.[64] DCA may also impose fines of up to $500 per infraction for violation of the laws and rules governing process server conduct.[65] In addition, DCA has authority to bring court proceedings for injunctive relief and monetary fines.[66]

In the past, DCA utilized its enforcement powers with some success. For example, in 1972, DCA began to call process servers in on a daily basis to examine their records. It also examined court dockets to determine which process servers were serving high numbers of summonses, and then contacted defendants purportedly served by these process servers to learn whether these individuals were actually served. These investigations led to hearings and the imposition of license suspensions and revocations.[67] Similarly, there was increased enforcement activity by DCA leading up to the 1986 Joint

61 Testimony of John Perez, DCA Process Server Hearing Transcript, at 60.
62 NYC Admin Code § 20-101.
63 NYC Admin Code § 20-104(d).
64 NYC Admin Code § 20-409.
65 NYC Admin Code § 20-104(e)(1).
66 This authority is similar to that exercised by the Attorney General in its recent actions against debt collection firms and a process serving company.
67 Tuerkheimer, *supra*, note 10, at 858.

Investigative Report. DCA reported that between 1984 and 1986, it revoked at least 146 process server licenses.[68]

Until 2008, when DCA engaged in increased enforcement activity prior to its public hearing, enforcement appeared to have waned. The response to a FOIL request submitted in preparation for this report indicates that DCA issued approximately 15 violations to individual process servers in a three-year period from 2006 to 2008. Most of these violations led to settlements in which the process servers agreed to pay fines. Two of the settlements resulted in agreed-upon license revocations, one for two years and the other for five years. There were no other license suspensions or revocations in that three-year period. From 2006 to 2008, DCA apparently issued no violations to process service companies, other than one for unlicensed activity.[69] During that period DCA held few if any administrative hearings: a review of the City Law website, where decisions of DCA administrative law judges are reported, reveals only one administrative hearing decision involving a process server between 2005 and 2008.

At a meeting with Civil Court Committee members and representatives of DCA in October 2009, the agency said that since the 2008 hearing it has aggressively sought to address the problems of the process serving industry, by, *inter alia*, issuing subpoenas and commencing license revocation proceedings. DCA representatives also said that the agency has commenced several undercover investigations, although they declined to provide the Committee with any information about the nature or number of these investigations.

---

68 Joint Report on Sewer Service, *supra* note 12, at 18.
69 FOIL Response by the New York City Department of Consumer Affairs, January 9, 2009; FOIL Response by the New York City Department of Consumer Affairs, July 2, 2009.

The response to a separate FOIL request made after the meeting with DCA indicates that the agency issued approximately 120 investigatory subpoenas in the months before its hearing in 2008. DCA issued approximately 54 hearing notices in 2009, of which 43 resulted in settlements with the cited process servers. In all of these settlements, the process servers agreed to pay a modest fine of between $300 and $600, and acknowledged that further violations could result in more severe penalties including license suspense or revocation.[70] In addition, the process servers agreed to follow all relevant rules and laws in the future (a number of which were specifically set forth in the agreements), and to submit to compliance reviews at six-month intervals for the following three years.

In one case, a process server with a track record of prior citations by DCA agreed to revocation of his license and a fine of $1,000. In five other cases, process servers failed to appear and ALJs rendered default decisions invoking a fine (ranging from $1,350 to $54,500) and revoking the process servers' licenses.

DCA thus commenced a number of investigations prior to the 2008 hearing and, thereafter, issued violations to 54 licensees. Under a theory of progressive discipline, the settlements reached in the majority of those cases would form the basis for further action if those process servers violate the law in the future.

There have been no other subpoenas issued since 2008, and no further hearing notices issued to process servers. Although DCA commendably engaged in an enforcement push in 2008, an obvious question is why it has not continued and expanded on that effort.

70 FOIL Response by DCA, December 31, 2009.

The Recommendations of the New York City Bar Association

The New York City Bar Association offers specific recommendations to remediate the rampant due process violations in the process serving industry. The Civil Court and Consumer Affairs Committees strongly recommend that DCA do more to enforce existing rules and regulations. Increased government oversight and a true commitment to eliminating sewer service are imperative for real reform. Lack of education requirements for process servers,[71] lax enforcement, and cavalier disregard of process service requirements by attorneys commencing consumer debt litigation and by many judges result in wholesale violations of the due process rights of tens of thousands of New Yorkers annually. It is essential that DCA, the New York City Council, the New York State Legislature, lawyers in the debt collection industry and the judiciary make fundamental changes in current industry practices.

A. Increased Government Oversight and Enhanced Commitment to Enforcement

1. Greater Investigation, Follow-Up and Enforcement by DCA

DCA must systemically and consistently conduct investigations and bring cases against process servers who engage in misconduct. Without proper enforcement, many process servers will continue to flout the law. In a very telling comment at the June 2008 DCA hearing, a process service company owner testified about "an air of complacency among process servers, because they know that nobody is checking on them."[72]

71 The City Council legislation passed on March 25, 2010 includes testing requirements for process servers.
72 Testimony of Samson Newman, DCA Process Server Hearing Transcript, at 155.

Enforcement efforts by DCA need to be dramatically ramped up. The crisis in the process service industry demands a response by DCA that is commensurate with the harm being experienced by the victims of sewer service in New York City. If DCA does not have sufficient resources to increase enforcement, it must be provided with additional funding and staff to enable it to carry out its mandate to ensure that process servers comply with the law.

At present, the courts are flooded with consumer debt cases of dubious merit in which service of process is defective, resulting in a high default rate in these cases. DCA itself has joined calls for closer regulation of the debt collection industry.[73] DCA must build on the investigations it commenced in 2008 and develop and implement a plan for sustained enforcement of the process server laws and rules to improve compliance by process servers and achieve its stated goal of curbing abusive and unfair debt collection practices. In order to be effective, that plan must include monitoring and investigations that routinely reach a significant portion of licensed process servers.

DCA should investigate all credible consumer complaints against process servers, traverse decisions where service has been ruled invalid, and other sources of information suggesting process service deficiencies. Although DCA commences investigations and takes administrative actions based on information received from consumers, the judiciary, and process servers themselves, the process must be significantly ramped up, and we make specific recommendations below.

73 Testimony of Andrew Eiler, DCA Director of Legislative Affairs, before City Council Committee on Consumer Affairs, February 25, 2009; testimony of Marla Tepper, DCA General Counsel, before Assembly Committees on Consumer Affairs and Protection, Judiciary, and Banks, May 14, 2009.

a. Systemic Review of Complaints and Other Sources of Information

Every consumer complaint to DCA should be reviewed to determine whether an audit of the process server and/or process service agency is warranted. Unless a consumer complaint is meritless on its face, DCA should audit the process server and process service agency (if an agency was involved), to determine whether the complaint is indicative of a wider course of improper conduct.

A DCA audit should be *required* when: DCA (i) receives a report that a traverse hearing results in a judicial finding of improper service; (ii) learns that a licensee has failed to report a traverse hearing as required by Rule 2-236; or (iii) receives a communication from a judge about improper conduct by a process server.

b. Periodic Audits

Complaint-generated enforcement is an insufficient deterrent to process servers who flout the law. Therefore, DCA should conduct periodic random audits of process servers and companies. DCA should audit a percentage of licensees annually, including conducting random audits at the time of license renewals.

c. Include Law Firms Within the Scope of Investigations

To the extent that law firms participate in or are complicit in practices by process servers that violate the law, DCA should investigate and prosecute those firms. The Attorney General's Office is to be commended for including law firms within the ambit

of its recent enforcement efforts in the debt collection and process services industries, and DCA should follow its lead.

Pursuant to its authority under the City Charter, the License Enforcement Law, and the Consumer Protection Law, DCA possesses, on the New York City level, the same powers of investigation and civil prosecution as the State Attorney General. DCA should include law firms within the reach of its investigatory and enforcement efforts with respect to process servers and should investigate and take appropriate legal action against law firms that participate in or condone illegal conduct by process servers.

2. *Enhanced Communication and Cooperation Between DCA and the New York City Civil Court*

Beginning in 2008, the Civil Court started mailing notices to defendants in consumer credit cases. This procedure provides a wellspring of important data for DCA to mine. When a defendant appears and informs the court that the court notice is the only notification of the lawsuit that she received, this strongly suggests that service in the case was improper. Similarly, when the court notice is returned "addressee unknown," "moved," or "address unknown," this indicates that the defendant was not served at her actual address. DCA should immediately begin using data generated from the court-mailed notices to commence investigations.[74]

DCA and the Office of Court Administration (OCA) should commence a joint campaign to encourage the judiciary to report traverse hearing outcomes. Judges should

74 *See* Testimony of Hon. Fern Fisher, Transcript of June 13, 2008 Hearing, at 25-35. Justice Fisher stated that the courts retain the returned envelopes and that the envelopes could be used to pull the file for particular cases, but that the court system does not have the resources to do that. Transcript at 31. Judge Fisher also directed her staff to retain all letters received from defendants who state that they only learned of the court case through the court notice. Transcript at 29.

be urged to bring to DCA's attention the results of traverse hearings and any irregularities in process service. OCA and DCA should make the process as user-friendly for judges as possible, including, for example, the use of an online reporting mechanism.[75] In addition, DCA must ensure that such reports are thoroughly investigated.

3. *Annual Reports on Process Servers*

Given the importance of fair and legal process serving to New York residents, DCA should issue an annual report on the state of the industry and DCA's regulatory efforts in this arena. Such annual reports are issued by other agencies, including the Federal Trade Commission, which is mandated by statute to prepare an annual report on debt collection.[76] The DCA annual report should contain statistics, including complaints received from consumers, reports of traverse hearings, referrals from the judiciary, actions taken by DCA, outcomes of administrative hearings, and other appropriate indicators and measures, including DCA's assessment of compliance with process service laws within the industry.

We propose that DCA be mandated by law to prepare such an annual report, but urge DCA to issue an annual report whether or not it is legally required to do so.

75 DCA also should ensure that its procedures for handling reports from judges are as efficient as possible. DCA should have a system to receive reports, take appropriate action, and track the results of its actions over time.
76 15 U.S.C. § 1692m.

4. Testing and Training of Process Servers by DCA

The Bar Association and other organizations have long advocated that New York City impose testing and education requirements as a prerequisite to obtaining and renewing a process service license in order to bring process servers into compliance with the laws governing service. Until City Council passed legislation on March 25, 2010 mandating testing for process servers, licensing rules were devoid of any requirements that applicants have knowledge of the laws governing process service. Thus, it should come as no surprise that process servers so often fail to comply with those laws. It is essential that process servers be educated about the laws governing service of process. There are at least five different bodies of law that govern process servers' conduct and service of process.[77] Before being permitted to serve process, a person should have an understanding of the practical application of these laws and rules. Training and testing must be required to ensure that process servers, at the very least, know: the requirements governing maintenance of log books; service requirements upon a natural person; the requirement that personal or valid substituted service be attempted before nail and mail service is effectuated; when substituted service is acceptable, including the circumstances under which a doorman or receptionist can be served; acceptable methods of serving corporations, partnerships, limited liability companies and other entities; how the service requirements for papers being served pursuant to the RPAPL (utilized in Housing Court

77 CPLR §§ 307-312, setting forth the requirements for service in actions; RPAPL §735, service requirements for eviction proceedings; GBL Article 89; the New York Code of Rules and Regulations; and the DCA laws and rules governing process servers' conduct, in particular Admin. Code § 20-403 and 6 RCNY § 2-231.

proceedings) are different from the service requirements set forth in the CPLR; and the applicable sanctions for failure to comply with the process service laws and rules.

Testing and ongoing educational requirements are mandated for many other occupations licensed by DCA. For example, an applicant for a home improvement contractor license must take a 50-minute test. Likewise, testing is required to obtain a tour guide license in New York City. Certainly, if tour guides are required to pass an exam to be licensed, testing requirements should be mandated for individuals who want to become process servers, an occupation with such a profound impact on the lives of hundreds of thousands of New Yorkers.

The industry itself cannot be relied on to provide the necessary training for process servers. Process servers are generally classified as independent contractors. Thus, the larger companies that retain their services have little motivation to invest in ongoing training, as a company might have if the individuals performing the work were employees. Anecdotal evidence suggests process service companies train newly licensed process servers by having them work with more experienced members of the occupation - who themselves have not had any training or testing. Thus, newly licensed process servers absorb information from individuals who may have little knowledge of the laws governing process service and may have bad practices in this area.

Education has the potential to raise the level of professionalism among process servers and to eliminate poor practices while curbing intentional misconduct. While education cannot substitute for a system of strict oversight of process servers, a testing and education requirement should reduce the frequency of improper service, and will at a

minimum inform process servers of the consequences of breaking the law. On a daily basis, process servers are called upon to make judgment calls about effectuating service. In order to make those judgment calls, they need to know the rules governing service. Accordingly, we are delighted that City Council passed legislation on March 25, 2010, supported by DCA, requiring that process servers be required to pass a substantive test to qualify for a license. Legislation should be enacted requiring process servers to take continuing education classes to qualify for license renewals.

B Improved Commitment by the Judiciary to Zero Tolerance for Improper Service

The courts have a key role to play in ensuring that process servers uphold their duty to follow the law and should not tolerate sewer service. Service of process is the first step in a judicial proceeding. Consistent with fundamental notions of due process and fairness, a person must receive proper notice of any judicial action in which she is made a party. The court system should demonstrate a renewed commitment to combating sewer service by creating a taskforce to monitor service of process and propose solutions.

Unfortunately and understandably, there are pressures – starting with the huge increase in Civil Court filings over the past few years – that may lead judges to be less attentive to unlawful service than they might otherwise be. Nonetheless, it is essential that the courts as an institution be seen as vigilant in insisting that the process service industry adhere to proper legal standards. The Civil Court took an important and commendable step in 2008 to protect the public from sewer service by implementing a procedure in consumer credit cases in which notices are mailed by the court to defendants prior to the entry of a default judgment. These mailings have notified defendants not

served with summonses that a lawsuit has been filed against them, enabling such defendants to appear and defend themselves.

However, the fact remains that the laws governing service of process are often honored in the breach. We believe that the court system must explore further initiatives to ensure that process servers adhere to the highest possible standards. The Deputy Chief Administrative Judge of the New York City Courts, together with DCA, should convene a taskforce to achieve this goal.

C. Legislative/Rule Changes

In addition to enhanced enforcement by DCA and greater commitment by the judiciary to combat sewer service, changes in the law are needed to address the due process shortfalls raised in this report.

1. Require Licensed Process Server Agencies to be Responsible for Conduct of Process Servers

New York City's process service laws and rules should be amended to ensure that process service companies are held accountable for the actions of employees or contractors who serve process on their behalf. The great bulk of process service is performed by process service companies, which typically use independent contractors to carry out service. The process service companies must be required to monitor and assume responsibility for the activities of individual process servers hired to serve pleadings and other legal documents.

The General Business Law already provides that a company is responsible for the acts of the process servers that it uses.[78] Although the New York City Law and Rules do not contain the same language, DCA has, by rule, incorporated all New York State laws concerning the service of process into its licensing scheme.[79] Thus, DCA currently possesses the authority to hold process service companies accountable for the work of the process servers serving papers on their behalf, and should use this power as a key component of its enforcement plan. However, to add clarity to DCA's current authority and enhance its enforcement of this mandate, the City's law and rules should reflect that process service companies are accountable for the actions of their process servers. We are happy that Intro 6-A, passed by the City Council on March 25, 2010, provides such clarity.

2. Mandate that Law Firms and Process Servers use Due Diligence to Confirm Addresses

CPLR § 308 requires that service upon a natural person be made at the person's actual place of residence or business. As noted in this report, debt collection firms often direct that a summons and complaint be served at an address listed in credit card records that are several years old. If the defendant has moved, service on the old address does not comply with § 308 and, not surprisingly, the defendant defaults.

In the computer age, it is quite simple to accurately determine a person's address. In fact, debt collectors routinely employ "skip-tracing," the practice of locating debtors by searching telephone directories, credit reports, voter registration records and other

78 GBL § 89-ee(2) provides, "A process serving agency shall be legally responsible for the acts of each process server to whom it has distributed, assigned and delivered process for service if it could reasonably have known that the process server was acting improperly."
79 Title 6 of the Rules of the City of New York, Rule 2-234.

sources. It is therefore inexcusable for any lawsuit to go forward based upon old, inaccurate records of a defendant's address.

This problem could be remedied by amending the CPLR to require attorneys who file consumer debt lawsuits to record how they determined that a service address is a defendant's actual address. Attorneys in consumer debt cases could also be required, when applying for a default judgment, to affirmatively state in an affidavit that they reviewed the affidavit of service and believe the defendant was served at the defendant's actual address. Even better would be a requirement that attorneys commencing consumer debt lawsuits utilize skip-tracing or other means to independently verify a defendant's address if the records of the debt are more than two years old.

We believe, however, that a remedy for this problem can occur through local law or rule changes and need not await action to amend the CPLR. One option is a local law or a DCA-promulgated rule geared toward the conduct of attorneys who file consumer debt lawsuits. The law or rule would define as a deceptive trade practice the filing of such a lawsuit with service of process at an address more than two years old, without the attorney obtaining independent verification that the address is still the defendant's address. Similarly, DCA could craft a rule geared toward process servers, to proscribe serving a summons in a debt collection suit without independent verification of the defendant's address if the records upon which the lawsuit is based are more than two years old.

We urge the City Council and DCA to immediately consider a local law and/or rule as described above.

3. Tighten the Obligation of Licensees to Report Traverse Hearings

DCA should amend its rules that require the reporting of traverse hearings in two key respects.

First, Rule 2-236, which requires process servers to report on traverse hearings to DCA, should be revised to make clear that this reporting obligation applies not only to individual process servers, but to process service companies as well. A review of the dozens of reports provided by DCA in response to our FOIL request included many that were submitted by companies. However, several company representatives at the June 2008 DCA hearing revealed that their organizations do not have a policy of monitoring traverse hearings involving challenges to service effectuated by their contractors. Several persons testifying on behalf of process service agencies said that their company would not necessarily even be aware of a challenge or that a traverse hearing was taking place.[80] Rule 2-236 should be amended to require that agencies advise DCA when their contractors or employees are called for traverse hearings and that they report the results of those hearings to DCA.

Second, Rule 2-236 should be amended to place a continuing obligation on individual process servers and process service agencies (if an agency was involved) to report the outcome of traverse hearings. The current rule requires process servers to notify DCA within 10 days of the conclusion of a traverse hearing, and to provide certain information including "any finding of the court regarding the service of process, if known." In a substantial number of the reports provided in response to our FOIL request,

80 *See* testimony of Alex Shafran, DCA Process Server Hearing Transcript, at 110-112; testimony of Jay Brodsky, DCA Process Server Hearing Transcript, at 138-140.

the licensee indicated "outcome unknown" or "decision reserved." Rule 2-236 would be much more effective (and process servers would be deprived of an easy way to avoid reporting that a challenge to service was upheld) if it were amended to place a continuing obligation upon licensees to report the outcome of a traverse hearing.

4. *Require Process Servers to Maintain Their Records for Seven Years*

Process servers and agencies are currently required to maintain their records for two years under the City's rules, and three years under the General Business Law.[81] Many debtor defendants do not discover they have been sued until more than two or three years after alleged service purportedly occurred. When a debtor defendant moves to vacate a default judgment on the basis of improper service, it may be impossible to review the process server's records dating from the time of service as the records may no longer be available. We have proposed that the City's rules and the General Business Law be amended to require process servers and process service companies to maintain their records for seven years. Many other offices are required to maintain records for this amount of time.[82] We are happy to report that City Council passed legislation on March 25, 2010 requiring that serving records be maintained for seven years in electronic form.

5. *Mandate Statewide Licensing of Process Servers*

Process servers operating in New York City are required to be licensed by DCA pursuant to Article 8-A of the General Business Law. As evidenced by the New York State Attorney General's investigation of one process serving agency, service problems

81 Rule 2-233(a)(6), 2-233(d); GBL § 89-gg.
82 For example, lawyers must maintain records for seven years, pursuant to DR 9-102D and schools must retain records and files for seven years, pursuant to 8 NYCRR 126.11.

are in fact statewide. Therefore, the City Bar recommends that this requirement be implemented statewide by amending Article 8 of the General Business Law to require process servers and process serving companies operating in New York State, outside of New York City, to be licensed by the New York State Department of State, which licenses a range of professions and occupations, from barbers and notary publics to real estate professionals. Under this proposal, process servers operating in New York City would continue to be licensed solely by DCA.

6. *Pass the Consumer Credit Fairness Act*

The City Bar is on record as supporting the Consumer Credit Fairness Act (CCFA), S.4398A, which passed the State Assembly in 2009 and is pending in the State Senate. The bill addresses numerous recurring problems associated with consumer credit transactions across the state, including problems related to process service. Specifically, the bill protects New Yorkers from unintentionally surrendering the defense of improper service, which is deemed waived if it is not raised affirmatively in a motion to dismiss, and adopts the additional notice provision already in place in the New York City Civil Courts statewide, which would ensure that more New Yorkers receive notice that they are being sued. Accordingly, the Bar urges State lawmakers to pass this critical legislation.

D. Structural Changes in the Industry

Lasting improvement in process serving will require structural changes within the industry. Absent structural change, any improvements may be short-lived. We therefore propose the following three additional recommendations:

1. *Require Process Servers and Companies to be Bonded*

Requiring a surety bond for licensed process servers and process serving agencies will enhance professionalism throughout the industry. Such a bond requirement is common among other industries licensed by DCA. Consistent with this report's recommendations, pursuant to legislation passed by City Council on March 25, 2010,[83] an individual process server can obtain a surety bond and continue to work as an independent contractor. To serve process without a bond, a process server will be required to work as an employee of a licensed process serving agency or alternatively, if the process server cannot obtain a bond, deposit $1000 into a fund to be established by DCA. This new legislation is supported by DCA.

Bonding will reshape the process serving industry by ensuring that only process service companies and individuals who can obtain a bond, or individual process servers who can deposit $1000 into a fund established by DCA, will be licensed, raising standards and accountability within the industry. Presently, process servers are monitored by DCA, and DCA primarily performs its monitoring function by investigating complaints it receives from the public. Even if fines were raised, a complaint-driven process has been shown to be woefully inadequate in curbing the abuses that occur regularly, as evidenced by the widespread sewer service described in this report. With the additional requirement of bonding, process servers will be required to meet underwriting standards that the surety bond industry will establish in response to the new legislation. These standards will encourage the hiring of responsible employees by process serving agencies and will increase the accountability and professionalism of the agencies with private market incentives added to existing governmental enforcement. Bonding will also ensure the availability of funds for compensation to victims of

83 Intro 6-A of 2010.

improper service and the payment of fines assessed against individuals or agencies that violate process service requirements.

2. *Require Use of a Global Positioning System (GPS)*

Local legislation passed by the City Council on March 25, 2010 also includes a provision, developed by DCA, to require process servers to use a global positioning system (GPS) when effecting service to electronically verify their location. The Committees supported this enhanced verification requirement, which will supplement the laws currently in place, including the continued maintenance of logbooks, and commends DCA for proposing to harness this new technology.

3. Improve Wages and Labor Law Enforcement for Process Servers

At present, process servers who serve process in consumer debt cases are paid very little for their services, often at piece rates at or below minimum wage. Consequently, they have every incentive to cut corners in their effort to earn a living. The process serving bill approved by City Council on March 25, 2010 addresses this issue by ensuring that more process servers will become employees instead of independent contractors, with the result that more process servers will be paid at least the minimum wage. The legislation also requires process serving agencies to inform process servers about their rights under wage and hour laws.[84]

84 The legislation also requires process service companies to educate and train process server employees about their professional duties and responsibilities. The new City law, supported by DCA, will have an impact on the current practice of consumer creditors and law firms who litigate consumer collection cases on the cheap by increasing the price of process serving to reflect the true and accurate cost of proper service of process, which may in turn limit the number of frivolous lawsuits flooding the courts. Notably, many process serving agencies pay their servers adequately and charge fees that cover the true cost of effecting quality service. This law will not change those agencies' business models significantly, and will in fact level the playing field by preventing businesses that promote shoddy service from accepting bulk contracts at below market rates. For these reasons the Bar Association is delighted that the City Council has passed this important bill.

It is likely that the quality of process service will be improved in consumer debt cases if process servers are paid more. Legislation should be enacted to require process service companies to charge no less than 75 percent of the fee charged by the Sheriff's Office for service of process. Based on the Sheriff's current fee of $42 per service, this would work out to $31.50 per service, which is in line with prevailing rates for reputable process serving firms in New York.

III. Conclusion

The time has come to put an end to the flagrant due process violations affecting thousands of New Yorkers each year – most often without their knowledge – and to crack down on what has long been known to be a problem-plagued industry. The process serving industry, DCA, the Attorney General's Office, the Courts, the Bar, City Council and the State Legislature must address this crisis and effect meaningful reform. It is essential that the recommendations set forth in this report be implemented to ensure that New Yorkers are not routinely deprived of their due process right to be heard in litigation commenced against them.

April 2010