



NEW YORK  
CITY BAR

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**PUBLIC HEARING: PROPOSED AMENDMENTS TO RULES REGARDING THE  
LICENSING OF PROCESS SERVERS  
DECEMBER 10, 2010**

**TESTIMONY OF CIVIL COURT COMMITTEE**

My name is Elizabeth da Victoria Lobo. I am a member of the Civil Court Committee of the New York City Bar Association, and am testifying on behalf of the Association. Our committee is comprised of practitioners in the New York City Civil Court, current and former attorneys from federal, state and city consumer protection agencies, legal services attorneys; consumer advocates; attorneys from private firms representing businesses in actions brought by consumer protection agencies; class action attorneys representing consumers and businesses; attorneys affiliated with local law schools and others with expertise in litigation and debt collection.

I am here to testify about the Department of Consumer Affairs' ("DCA's") proposed rules pertaining to process service. The Committee believes that for the most part, the proposed rules are excellent and will help reform the process serving industry, which is plagued with shortcomings causing devastating problems for countless New Yorkers.

**Background**

New York courts are suffering under the exponentially increasing weight of consumer credit litigation. In 2009, for example, 241,195 debt collection lawsuits were filed in New York City alone. These cases are overwhelmingly brought against low- and moderate-income New Yorkers, many of whom are elderly or disabled, and nearly all of whom are unrepresented. Approximately 66% of these cases result in "default" judgments – automatic wins for the debt collector because the defendant failed to appear in court. The consequences of these judgments can be devastating: frozen bank accounts and garnished wages, preventing vulnerable New Yorkers from being able to support their families, and severe damage to these individuals' credit ratings, affecting their ability to secure housing and obtain employment. Based upon our experience as practitioners handling these types of cases, we believe the principal reason for the high rate of defaults is that consumers are not properly served with notice of lawsuits commenced against them as required by law.<sup>1</sup>

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<sup>1</sup> See, e.g., MFY Legal Services, Justice Disserved (June 2008) (available at [http://www.mfy.org/Justice\\_Disserved.pdf](http://www.mfy.org/Justice_Disserved.pdf)).

## **Highlights of the Rule**

The Committee commends DCA on many provisions in the Rules. The Rules contain important recordkeeping provisions, including the requirement that both attempted and effected service are recorded in chronological order in a single volume until all space in the volume is filled. Likewise, the Rules contain important record maintenance provisions, requiring that routing sheet work orders, other written instructions; copies of notes, memos, or other written materials submitted by a licensee, affidavits of service and other original records be kept for seven years. Additionally, the Rules require process service agencies and process servers to report traverse hearings and results. Finally, the expanded definitions section adds clarity to the Rules and Administrative Code.

## **Suggested Modifications**

1. **Section 2-231 Definitions:** The Committee recommends removing "no later than 24 hours after the event" from the definition of "contemporaneous." Waiting up to 24 hours to make an entry might compromise its accuracy because a process server is more likely to forget details of service the longer he or she waits to record them, particularly considering the volume of process served or attempted by most process servers in a twenty-four hour period. Moreover, to be admissible in court, a process server's logbook must conform to the requirements of a business record in New York Civil Practice Law and Rules ("CPLR") § 4518(a). This provision requires that the record must be made, "at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." New York courts have held that the reasonable period of time for a process server to make a logbook entry is very short. In *Masaryk Towers Corp. v. Vance*, 12 Misc.3d 1172(A), 2006 WL 1724046 (N.Y. Civ. Ct. 2006), the court held that the process server must make the notation in a logbook immediately after service and that waiting to the end of the day was too long. Therefore, a twenty-four hour period in which to make a record is inconsistent with current law.
2. **Section 2-231 Definitions:** An image file is defined in Section 2-131 as "a file that contains graphic data such that the file is an exact replica of a specific set of data, and is saved in a graphics format such as a portable data file ("pdf"), joint photography experts group ("jpeg"), graphics interchange format ("gif") or tagged image file ("tif") file." This definition is too broad and the Committee recommends limiting it to a universal format. Some individuals and organizations may not have the technology to open so many different kinds of file formats. If one file format is required, then individuals and entities will only need to have the specified computer program to open that file format. Moreover, some formats may be easier to alter than others. We note that the electronic filing systems in the United States District Courts and New York State permit only the use of portable data files ("pdfs"). Because a process server's image files may need to be accessed by a court, DCA should consider requiring all files to be stored in the "pdf" format which the courts can access.
3. **Section 2-231 Definitions:** The Committee recommends defining "person" to include agency. We believe that this will clarify that a process service agency is a "person" as used in the statute.

4. **Section 2-231 Definitions:** The Committee recommends defining the word “purpose” as used in Int. No. 6-A to be one purpose, but not necessarily the sole or primary purpose, of any person, firm, partnership, association or corporation. The Committee believes that the current statutory language could be interpreted to mean a “sole purpose” which could have the effect of excluding organizations which engage in process serving as well as other activities from its reach.
5. **Section 2-232d Testing:** The Committee recommends specifically enumerating testing requirements and minimum standards for process servers’ knowledge of applicable laws and rules. At a minimum the test should measure knowledge of the five different bodies of law that govern process servers’ conduct and service of process.<sup>2</sup> The exam should measure individuals’ understanding of the practical application of these laws and rules. 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 proceedings) are different from the service requirements set forth in the CPLR; and the applicable sanctions for failure to comply with the process services laws and rules. The testing should also cover the new record-keeping requirements set forth in the proposed Rules.
6. **Section 2-234a Duties of Process Serving Agencies:** This section narrows the responsibility of process service agencies for acts of their process servers from that in the legislation. The rule makes a process service agency responsible only if it “knows or reasonably should know that the process server is acting improperly and/or is not complying with relevant laws or rules,” (emphasis added) whereas the legislation states that the process serving agency is “legally responsible for any failure to act in accordance with the laws and rules governing service of process by each process server to whom it has distributed, assigned or delivered process for service.” The rule appears to change the standard of liability set out in the statute, and we do not believe the agency can or should change the standard of liability through rulemaking. Therefore, we recommend that the original language in the process server law should be used.
7. The Committee recommends the addition of a provision requiring that process service agencies provide employed process servers with a description of employee rights and employer obligations regarding the minimum wage, overtime, hours of work, recordkeeping, social security payments, unemployment and disability insurance coverage and workers’ compensation at the time an offer of employment or work is extended. Further, the Committee recommends that DCA prepare and distribute the required language of the statement of rights and obligations to the process serving agencies it licenses. The requirement that employees of process service agencies be

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<sup>2</sup> 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.

informed of their rights is set forth in NYC Admin. Code § 406.2(b). This requirement is similar to the requirement set forth in NYC Admin. Code § 20-771 regarding domestic workers who seek employment through employment agencies licensed by DCA. To implement the latter statute, DCA prepared a “Statement of Employee Rights and Employer Responsibilities” (see [http://www.nyc.gov/html/dca/downloads/pdf/employmentagency\\_english.pdf](http://www.nyc.gov/html/dca/downloads/pdf/employmentagency_english.pdf)). The Committee recommends that DCA prepare a similar statement for process serving agencies to distribute to their employees.

8. **Section 2-233 Records, Section 2-233a Electronic Records, Section 2-233b Electronic Record of Service:** These sections contain important recordkeeping rules for process servers and process service agencies. The Committee recommends consolidating these sections into one to avoid confusion and overlap and placing rules governing process servers in one subdivision and rules governing process service agencies in another; a suggested consolidated section is set forth in Appendix A. Consolidation and reorganization along these lines would make the recordkeeping requirements more understandable to process servers. The Committee additionally recommends that DCA prescribe specific guidelines and standards for backing up electronic records.

The Committee’s recommendations for specific subdivisions in these sections are as follows:

- a. Recordkeeping Requirements for all Methods of Service: Section 2-233(a)(3) and (4) assume that service pursuant to CPLR Section 308 is the only means of personal service upon a natural person in actions and proceedings that originate in courts within the City of New York. These subsections overlook other rules governing service, such as Real Property Actions and Proceedings Law (“RPAPL”) Section 735, which governs the manner of service in summary proceedings in Housing Court. The Committee has drafted proposed language incorporating both laws into the proposed rules, which are set forth in Appendix A.
- b. Chronological Recordkeeping: The rules should explicitly require separate and chronological entry of every attempt at service and each effectuated service irrespective of the service method. We have suggested moving this requirement from Section 2-233(a)(4) to a Section 2-233(a)(1).
- c. Contemporaneous Recordkeeping: Section 2-233(b)(1) requires contemporaneous entry of "the date, time, and address" of every service in the logbook. To ensure accuracy of logbook entries and their admissibility in court, case law requires all recordkeeping information of a process server to be made contemporaneously. We propose amending §2-233(b)(1) to state, "The licensee shall make a separate and contemporaneous entry of all records required in Section 2-233(a) in a bound, paginated volume."
- d. Keeping all Information Needed in Records Together: Section 2-233(a) contains a list of required information that process servers must keep in their records. However, Section 2-233(b)(3) through (b)(7) also contains information that

process servers should keep in their records. These provisions seem out of place in Section 2-233(b), which addresses the maintenance of records. We suggest moving these provisions to Section 2-233(a).

- e. Timing of Scanning: Section 2-233a contains several references to the timing of required scanning, but states them in different ways, i.e., that scanning is required “within twenty-four hours from the last event that this file records,” within twenty-four hours from the last event the record records,” or “within twenty-four hours after the day of the event recorded occurred.” We believe that defining the scanning time requirement in this way is confusing, cumbersome and contradictory. A more straightforward approach is to require that scanning take place by the end of the day (or by midnight of the day) after the day of the event recorded. We recommend that any reference to the timing of scanning be framed uniformly in this way.

There is a further particular problem in Section 233a(a)(1)(ii), which requires that a process server scan the file “within twenty-four hours from the last event that the record records such that the date the file was last modified is within twenty-four hours from the last event that the file records.” No time period should run from the date any file was “last modified.” A process server should never modify a scanned copy of any original document because a modified document is no longer an original contemporaneous record of the service. The goal of requiring timely scanning of process server’s logbooks was to prevent process servers from editing the contents of a logbook at a later date. The Committee recommends deleting the language “was last modified” from Section 2-233-a(a)(1)(ii) so that it reads “such scanning shall be done by the end of the day after the date of the last entry recorded on the page.”

- f. The Process Server’s Option to Maintain Records Pursuant to Section 2-233a(b): The Committee commends the Agency for including a requirement to make an electronic copy of the process server’s log book and recommends that a process server be required to make an electronic copy, instead of giving the process server the option to maintain records pursuant to Section 2-233a(b).
  - g. Finally, the Committee notes that Sections 2-233a(b)(3) and (4) make reference to Sections 2-233(c)(1)(a) and 2-233(c)(1)(b-e), neither of which exist in the proposed rule.
9. The Committee also recommends the addition of subdivisions that at a minimum, track the language of Sections 20-409.1 and 20-409.2 of the new process service law:

20-209.1, Violations and Penalties, provides that “any person who, after notice and hearing shall be found guilty of violating any provision of this subchapter, shall be punished in accordance with the provisions of chapter one of this title and shall be subject to a penalty of not less than seven hundred dollars nor more than one thousand dollars for each violation.”

20-409.2, Civil Cause of Action, states that “any person injured by the failure of a process server to act in accordance with the law and rules governing service of process in

New York state, including this subchapter and regulations promulgated thereunder, shall have a cause of action against such process server and process service agency, which distributed or assigned process for service, in any court of competent jurisdiction for any or all of the following relief:

- a. compensatory and punitive damages, provided that punitive damages shall only be awarded in the case of willful failure to serve process;
- b. injunctive and declaratory relief;
- c. attorneys' fees and costs; and
- d. such other relief as a court may deem appropriate.”

These provisions of the new law are important tools which can be utilized by DCA and individuals who have been subjected to actions by process servers or process service agencies who have violated the law, and accordingly, should be highlighted in the final rules.<sup>3</sup>

### **Conclusion**

Thank you for giving the Civil Court Committee of the New York City Bar Association the opportunity to comment on the proposed regulations. We would be happy to discuss the proposed rules in more detail and invite DCA to contact us regarding any matter raised in our comments or the proposed rules.

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<sup>3</sup> As we have stated in previous testimony on the bill, we believe that the private right of action should be limited to persons who were improperly served with process.

## APPENDIX A

The Committee suggests consolidating Sections 2-233 and 2-233a as set forth below. The underlined language represents modifications to the rules as suggested above.

### Section 2-233

(a) *Duty of individual licensee to keep records.* Each process server shall keep records in compliance with the provisions of 89-cc of the General Business Law, as follows:

(1) Each process server shall maintain a legible record in chronological order of every attempted and effectuated service as prescribed in this section.

(2) The record to be maintained shall include the following information, where applicable:

- (i) the title of the action or a reasonable abbreviation thereof;
- (ii) the name of the person served or on whom service was attempted, if known;
- (iii) the date and approximate time service was attempted or effected;
- (iv) the address where service was attempted or effected;
- (v) the nature of the papers served or attempted to be served;
- (vi) the court in which the action has been commenced;
- (vii) the index number of the action, if known.

(3) The written entry for each service shall include the type of service effected whether personal, substituted or conspicuous as follows:

(i) If personal or substituted service is effected pursuant to subdivisions one, two or three of section three hundred eight of the civil practice law and rules or section 735(1) of the real property actions and proceedings law, the record shall also include the description of the person served, including, but not limited to, sex, color of skin, hair color, approximate age, height and weight and other identifying features.

(ii) If service is effected pursuant to subdivision four of section three hundred eight of the civil practice law and rules or nail and mail service is effected pursuant to section 735(1) of the real property actions and proceedings law, the record shall also include the dates, addresses and times of attempted service. ~~All attempts must be entered in a separate, chronological entry.~~

(iii) If nail and mail service is effected pursuant to CPLR § 308(4) or RPAPL § 735(1), the entry shall include a description of the area adjacent to the door to which process is affixed including the color and composition of hallway walls, color and composition of hallway floor or doorstep, and location of premises in relation to stairs, elevator or entranceway.

(iv) The entry shall include the name and license number of the process server organization from whom the process was received, or, if not received from a process server organization, of such other person or firm from whom the process was received.

(v) If service is made pursuant to RPAPL § 735(1) in a manner other than by delivery of the notice of petition and petition to the respondent personally, the entry in the process server's record of service or attempted service shall include the postal receipt number of registered or certified mail.

(vi) If service is made pursuant to NYC Admin. Code § 27-2115(j) or RPAPL § 771 (5)(a)(2) or 5(b), the entry in the process server's record of

service or attempted service shall include the postal receipt number of registered or certified mail.

(6) If an affidavit of service is filed with the court, the record shall include the date of such filing.

(b) *Licenses who serve process shall also maintain their records in the following manner:*

(1) The licensee shall make a separate and contemporaneous entry of all records required in Section 2-233(a) of the date, time and address of every attempted and effected service of process in chronological order in a bound, paginated volume.

(2) The licensee shall make entries in only one volume at a time, which shall contain every attempted and effected service made by the licensee, until all of the available space in the volume is filled.

(3) Corrections in records shall be made only by drawing a straight line through the inaccurate entry and clearly printing the accurate information directly above the inaccurate entry. All other methods of correction, including but not limited to, erasing, opaquing, obliterating, or redacting are prohibited.

(4) Process servers shall retain each record required to be kept under § 2-233(a) for a period of seven years from the date of service. Where a process server is employed as a process server by any person, a copy of such records shall also be maintained by such person at his principal office in this state for the same period.

(5) Within twenty-four hours of making a written entry in a volume pursuant to 2-333, a process server shall scan the entry into an electronic image file that legibly reproduces the original entry scanning into an image file that legibly reproduces in all details on a daily basis the original record the process server maintains in a bound volume pursuant to section 2-233:

(i) the image file shall be named with the date or dates of service or attempted service contained in the entry or entries and the process server's license number;

(ii) the image file shall be date and time stamped with the date and time the file was created;

~~(ii) such scanning shall be done within twenty four hours from the last event that the record records such that the date the file was last modified is within twenty four hours from the last event that this file records~~

~~(iii) the process server must save the scanned image file to a portable media device at least once per week and shall maintain the portable media device in a manner designed to ensure its security and preservation, including by keeping it in a location separate from the original image file; and~~

(iii) the image file shall be saved to a portable media device and a computer hard drive or server that is regularly backed up. Such portable media device shall be labeled with the process server's last name, license number, and the date range of records stored on the device.

(c) *Duty of licensed process serving agencies to keep records.* Every process serving agency shall keep complete and accurate records with respect to each individual licensee to whom it distributes, assigns or delivers process to be served. Such records



shall be kept in a searchable manner that permits ready identification of (i) the daily activity of each such individual licensee and (ii) any or all process assigned or distributed for service by the name of the person or entity from whom the process serving agency received such papers for service.

(1) The records shall at a minimum include:

- (i) The name and license number of the individual licensee to whom process is distributed, assigned or delivered to be served;
- (ii) All of the information required to be maintained pursuant to ~~subdivisions (a) and (b) paragraphs (1) through (5) of subdivisions (a) and paragraphs (3) through (5), and (7), of subdivision (b) of this rule.~~;
- (iii) A copy or a scan to an image file that legibly reproduces the original record in all details of the individual licensee's record maintained pursuant to subdivisions (a) and (b) of this rule for each day on which the individual licensee attempted or effected service of the process assigned to the individual licensee;
- (iv) A copy of every routing sheet, work order or other written instruction given to the individual licensee;
- (v) Copies of any notes, memoranda or other writings submitted by the individual licensee containing information related to the attempted or effected service of process;
- (vi) A copy of every affidavit of service signed by the individual licensee.

(2) Availability of records.

(i) All records shall be retained by the licensee for seven years or until further order of the Department and shall be available for inspection by the Commissioner of Consumer Affairs or his designee.

(3) Within twenty-four hours after an event recorded pursuant this subdivision, the required information pursuant to this subdivision shall be input into an electronic record-keeping system either as provided by the Department as an Excel spreadsheet or by a third party document management system that contains separate fields with parameters as follows:

- (i) name of the individual process server to whom service is assigned, which will be entered as last name, first name;
- (ii) the license number of the individual process server to whom service is assigned, which will be specified as a seven digit number, where the first number shall be zero if the process server's license number is less than seven digits;
- (iii) the title of the action, if any;
- (iv) the name of the person served or on whom service was attempted, if known, which shall be entered as last name, first name;
- (v) the date that service was attempted or effected, which shall be entered as MM/DD/YYYY;
- (vi) the time service was attempted or effected, which shall be entered in military time;
- (vii) the address where service was attempted or effected, which shall be entered as three different fields such that one field will be for the street address and any apartment number, the second field will be for the city or borough, and the third field will be for zip code;

(viii) the nature of the papers served or attempted to be served;  
(ix) the court in which the action has been commenced, which shall be entered as either Civil Court NYC, Civil Supreme, Criminal, Housing (L/T or HP), or District Court, followed by the county of the court, the judicial department if appellate, or the federal district;

(x) the full index number, which shall be entered with all information necessary to identify the case, such as XXXXX/XX, unless the case is a Civil Local matter, in which case, it will include the prefix of CV, CC, LT, HP,MI, NC, RE, SC, or TS;

(xi) if personal or substituted service was effected pursuant to subdivisions (1) through (3) of CPLR § 308 or RPAPL § 735(1), a description of the person served which shall consist of six fields, including sex, hair color, approximate age, height and weight, and any other identifying features;

(xii) whether service was delivered, as indicated by a Y or N;

(xiii) the type of service effected, which shall be entered as a P for personal service, an S for substitute service, or a C for conspicuous service;

(xiv) if conspicuous place service was effected pursuant to subdivision (4) of CPLR § 308 or subdivision one of RPAPL § 735, a description of the door and adjacent area.

(4) If the process serving agency elects to record the information pursuant to section 233(a) and (c) itself rather than through a third-party provider, it shall convert such information into a portable document (“pdf”) format within twenty four hours from the last recorded event. The process serving agency shall ensure that the security settings for this converted pdf are set so that editing and printing of the document is restricted and no edits or changes may be made to the document.

(5) Licensees shall use an electronic records management system that (a) ensures authenticity, reliability and integrity of the digital records; (b) permits efficient retrieval of digital records; (c) contains a backup support system such that electronic records shall be capable of being reconstructed in the event of an electronic computer malfunction or unforeseen accident resulting in the destruction of the system or the information contained therein; (d) preserves the electronic records by either submitting the record entries to a third party service on a daily basis or copying the file to a portable media device within one week of a creation of the file. Such a device must be maintained in a manner designed to ensure its security and preservation, including by keeping it in a separate off-site location.

(d) Process servers shall not tamper with modify, amend, delete, rearrange or in any other way alter any data or properties of any electronic record kept pursuant to this section more than twenty-four hours after the last event.