



**NEW YORK  
CITY BAR**

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**DEPARTMENT OF CONSUMER AFFAIRS PUBLIC HEARING:  
PROPOSED AMENDMENTS TO PROCESS SERVICE RULES REGARDING  
THE REQUIREMENT THAT PROCESS SERVERS UTILIZE  
A GLOBAL POSITIONING SYSTEM**

**TESTIMONY OF THE CIVIL COURT COMMITTEE**

**JANUARY 27, 2011**

My name is David Tipson. I am a member of the Civil Court Committee (“the 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 regarding the requirement that process servers utilize a global positioning system.

**HIGHLIGHTS OF THE RULE**

The Committee believes that the Proposed Rule is a positive step towards implementation of section 20-410 requiring electronic records of service. The Committee commends DCA on recognizing that so-called sewer service represents an infringement on basic due process rights and is particularly pervasive in consumer debt cases. The Proposed Rule would deter sewer service and would in many cases detect its occurrence. The Committee also applauds DCA’s proposed requirement that process servers contract with an independent third party to provide data storage and retrieval services.

**SUGGESTED MODIFICATIONS**

**1. Section 2-233b(a)(1) Equipment:**

This section requires that the process server “obtain a mobile device...that utilizes the software necessary to make a digital record of the location where, and the time and date when, the record is made as determined by [GPS] technology...[or] by triangulated cell tower signals, in the event that at the time of the effected or attempted service of process, a GPS signal is not available.”

The Committee recommends adding a requirement that, in addition to GPS and cell-tower triangulation, the mobile device also utilize a hybrid positioning system – either Assisted GPS (“A-GPS”) or wi-fi positioning. Hybrid positioning systems combine signals received from GPS satellites with signals from other sources to pinpoint a user’s location. Hybrid positioning is critical in dense places with high-rise construction (i.e. New York City) where standard GPS receivers often do not have sufficient lines of sight with four separate satellites – the minimum number of satellites required to fix a position with GPS alone. Assisted GPS (“A-GPS”) or wi-fi positioning is a standard feature on most mobile phone platforms today and requiring one of them in addition to GPS and cell-tower triangulation will not place additional costs on process servers. Because new hybrid positioning systems are developed every day, DCA should also reserve the right – separate from the rulemaking process – to add to, delete from, or otherwise modify a list of acceptable hybrid positioning systems. “Hybrid positioning” should be defined in the “Definitions” section recommended below.

DCA should also require that the mobile device be capable of photographing the door to the apartment unit, home or business to which the papers are addressed.<sup>1</sup> Even hybrid positioning systems are not capable of perfect accuracy in areas with high-rise construction and will not, in any case, indicate which floor of a building a process server visited. To prevent process servers from leaving documents in the first-floor lobby of a building instead of actually serving the defendant, the Committee recommends that DCA require process servers to take a photograph of the door to the apartment unit, home or business to which the papers are addressed. The photograph should serve as the “digital record” required in section (a)(1) and should record “the location where, and the time when, the record is made” as determined by a hybrid positioning system as recommended above. A photograph requirement would deter “lobby service” and would, at the same time, provide an additional method of proving service.

## **2. Section 2-233b(a)(2) Operation of Equipment:**

As discussed above, the Committee recommends that on every occasion that the process server attempts or effects service of process, the process server shall ensure that the mobile device takes a photograph of the door of the apartment unit, home or business to which the papers are addressed as the “digital record” required in this section with “location, time and date of the attempted or effected service.”

## **3. Section 2-233b(a)(3) Contract for Services:**

This section requires the process server to contract with an independent third party to provide data storage and retrieval functions. The Committee recommends that DCA consider ways of either certifying data storage companies or relying on existing certification systems, such as SSN, and requiring that process servers and companies contract exclusively with companies certified by DCA.

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<sup>1</sup>The Committee is mindful of potential privacy concerns in regards to photographing the door where service was attempted or effectuated. However, the Committee believes that any such privacy concerns are, on balance, outweighed by the need to meaningfully curb sewer service in New York City. Moreover, the doors to the vast majority of homes and businesses in New York City are in plain view to the public-at-large. Apartment doors are plainly visible to all residents of the apartment building and, in some apartment buildings, are under constant surveillance of hallway cameras and monitors installed by the landlord.

#### **4. Section 2-233b(a)(4) Data Storage and Retrieval:**

This section states that “the digital record shall automatically be transmitted electronically from the mobile device to the Contractor as soon as a GPS or cellular signal is available and location, date and time are entered into the digital record.”

The Committee believes, consistent with its testimony presented on December 10, 2010, that all requirements related to keeping of records in sections 2-233 (Records), 2-233a (Electronic Records), and section 2-233b (Electronic Record of Service) should be consolidated and integrated within a single section to avoid confusion and overlap. Process servers should be required to input location, time, and date information from the “digital record” required in section 2-233b manually in the Bound Volume required in the proposed section 2-233. Process Serving Agencies should also be required to input location, time, and date information from the “digital record” electronically in the “Electronic Records Management System” required in DCA’s proposed section 2-233a. Process Server Agencies should be explicitly allowed to use the same firm to serve as both the “third party document management system” contemplated in proposed section 2-233a and the “Contractor” required in section 2-233b. Consolidation and integration along these lines will make it easier for DCA and parties to lawsuits to retrieve all records, will reduce the possibility of conflicting information within the records, and will allow process servers and Process Serving Agencies to realize greater efficiencies in complying with the requirements. In addition, the word “the” should be added before the word “location” (see #12, below).

The Committee also recommends that DCA include a provision in this section requiring process servers, when filing the required proof of service with the courts pursuant to NY CPLR §306, to include in the notice the GPS coordinates of the location at which process was served. This requirement will help ensure that process servers are complying with DCA’s new rules and will deter manipulation of data if service is challenged in court.

#### **5. Section 2-233b(a)(4)(iv) Data Storage and Retrieval:**

The Committee recommends that DCA state that the Contractor is the custodian of the records for the purposes of laying a foundation for the business-records exception to the hearsay rules under CPLR Section 4518(a). In addition, the rules should provide in some way that the individuals requiring testimony from the Contractor to lay a business record foundation do not have to bear the travel costs of the custodian.

#### **6. Section 2-233b(a)(4)(vi) Data Storage and Retrieval:**

The Committee recommends that in addition to the Contractor providing DCA with a street map in hard copy format and access to an interactive electronic street map that displays the locations where the digital records were recorded, that the Contractor produce the same documents and provide the same access “to any other party pursuant to an appropriate order or subpoena,” which is consistent with Sections 2-233(b)(a)(4)(v) and (vii).

**7. Section 2-233b(a)(4)(vii)(C) Data Formats:**

The Committee recommends that DCA add the prefix HP (the Housing Part of New York City Civil Court) to the list of prefixes identifying a Civil Local matter.

**8. Section 2-233b(c) Report to Department:**

This section requires a licensed process server to submit to DCA within sixty days after the effective date of this Rule “a certification that he or she has secured the contract required by this Rule and identifying by name, address and account number of the Contractor(s) providing the required device and services.” The Committee recommends a longer period of one hundred and eighty days for process servers to implement this Rule so that DCA has the time to certify entities as qualified Contractors and process servers have time to carefully find and choose a diligent third-party Contractor.

**9. Definitions:**

The Committee recommends that DCA include a separate “definitions” section to define the following terms as they are used in the technology industry: “CASS system,” “Global Positioning System (GPS),” “Military Time,” “Triangulated Cell Tower Signals” and “Hybrid Positioning.”

**10. Suggested addition:**

233b(a)(1)(i) add at the end of “the DCA license number of the process serving agency that has distributed the process for service” “if any.”

**11. Typographical errors:**

a) In the introduction, Rule: ‘Subchapter 2 “or” Chapter 2 or title 6 of the Rules of the City of New York’ should be changed to ‘Subchapter 2 “of” Chapter 2 or title 6 of the Rules of the City of New York.’

b) In section 2-233b(a) the words “his of her” should be changed to “his or her.”

c) 233b(a)(4) Data Storage and Retrieval. Add the word “the” before the word “location.”

d) In section 2-233b(a)(4)(vii)(G) ‘entered “as” military time’ should be changed to ‘entered “in” military time.’

e) in section 233b(c) “identifying by name, address and account number of the Contractor(s) providing the required service” should be changed to “identifying by name, address and account number the Contractor(s) providing the required service.”

f) In the Section entitled “Statement of Basis and Purpose,” second paragraph, third line, “process servers to carry at all ‘time’” should be amended to “process servers to carry at all ‘times’” and “during the commission their licensed activities” should be changed to “during the commission ‘of’ their licensed activities.”