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DEPARTMENT OF CONSUMER AFFAIRS PUBLIC HEARING: PROPOSED AMENDMENTS TO RULES REGARDING THE LICENSING OF PROCESS SERVERS JUNE 13, 2011

WRITTEN TESTIMONY OF CIVIL COURT COMMITTEE

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 regarding the proposed amendments to rules regarding licensing of process servers. The 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.

The Committee commends the Department of Consumer Affairs ("DCA") for its efforts to reform the process serving industry, the shortcomings of which have been previously well documented. We support the amendments to these rules that clarify and simplify the new recordkeeping requirements. However, the Committee opposes those amendments which substantively reduce the recordkeeping obligations of process servers and suggests modifications where possible.

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 resulted in "default" judgments – automatic wins for the debt collector because the defendant failed to appear in court. In 2010, 201,126 consumer credit cases were filed with a citywide default rate of 58%. 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,

¹ See, e.g., MFY Legal Services, Justice Disserved (June 2008) (available at http://www.mfy.org/Justice_Disserved.pdf); New York City Bar, Out of Service: A Call to Fix the Broken Process Service Industry (April 2010) (available at http://www.abcny.org/pdf/report/uploads/ProcessServiceReport4-10.pdf).

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.

Amendments to the Rules

Many of the amendments to the rules are practical and serve to simplify and clarify the new paper and electronic recordkeeping requirements. However, the Committee believes that some of the amendments are problematic and should be further modified.

Amendments the Committee Supports

- 1) The Committee supports the provision under Section 2-233 regarding the obligation of a process server to include in his or her records the date of the filing of an affidavit of service in court when he or she is the one who actually files the affidavit. In addition, the Committee supports the requirement under Section 2-233 that limits the obligation of the individual process server to record the registered or certified postal receipt number when the process server personally does the mailing. These amendments clarify language which could have been interpreted to obligate a process server to record actions he or she has not personally taken and lacks any personal knowledge of.
- 2) The Committee also supports the added method for licensees to correct typographical errors in or inadvertent omissions from the entry into electronic format of the information contained in the individual process server's papers records. We understand that mistakes sometimes occur and believe a process server should have the opportunity to correct them. The language permits process servers to correct electronic errors in a similar manner to that which is already allowed for a log book error.

Amendments the Committee Opposes

1) The Committee does not support the amendments to Section 2-233(a)(6) and (c)(2) that shorten the time that licensees must maintain original paper records from seven years to three years from the date of service. Many defendants, who are improperly served, particularly in consumer credit transactions, do not discover they have been sued until many years after alleged service purportedly occurred. It is imperative that defendants be able to review a process server's original records dating from the time of service. While the proposed amended rules require licensees to maintain electronic records for seven years, the rule should continue to require that original, paper copies of these files be maintained as well. As trial practitioners who conduct traverse hearings are well aware, it is much easier to detect improprieties in original records than in copies.²

² Many other industries are required to maintain records for this amount of time: 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.

The process serving industry claims that DCA has exceeded its authority by including in the originally promulgated rules a requirement that original, paper records be maintained for seven years. Significantly, DCA's decision to require seven years of record retention poses no conflict with Gen. Bus. Law § 89-cc. Section 89-gg of the General Business Law sets a minimum time period of three years for the retention of records under § 89-cc and does not set a maximum. Therefore, DCA did not exceed its authority in requiring retention of original, written records for seven years.

Moreover, DCA was authorized under NYC Admin Code § 20-406.3 to require that paper records maintained in compliance with Section 89-cc of the NYS Gen. Bus Law be kept for no less than 7 years. The fact that the code section also states that "such records shall be maintained in electronic form" does not negate a requirement that such records be kept in their original form as well for seven years. If DCA believes that the law does not give it the authority to require that original, paper records be kept for seven years, we strongly encourage that it request that City Council amend the legislation to clarify that written records must be maintained for seven years.

2) The Committee does not support the amendment to Section 2-236(b) requiring a process server to provide his or her records to DCA when a traverse hearing has been scheduled only upon request by the agency. We believe this change will cause unnecessary delay in acquiring documentation and will prejudice victims of sewer service. If a traverse hearing has been scheduled then there is already an allegation of improper action on the part of the process server which DCA should promptly investigate. If DCA must first send a request to the process server and then wait for a response from the process server, this will cause serious delays during which time a process server could potentially continue effectuating sewer service. In addition, it is not cost effective for DCA to be required to make such requests, as this will require the agency to expend unnecessary time and personnel resources on such requests.

Further, this requirement will not require DCA to acquire and store a large volume of paper documentation. DCA could permit process servers to email this documentation as electronic attachments, eliminating the need for paper document retention. Moreover, the documentation to be furnished to DCA would be minimal, consisting only of copies of the process server's log book pages where the service is recorded, routing sheets and the affidavits of service pertaining to the contested service.

Suggested Modifications

1) The proposed change to Section 2-236 of the rules eliminates the requirement that the licensee have an affirmative obligation to report to DCA the result of such hearing within 10 days of the issuance of a decision or settlement of the challenge and substitutes it with a requirement that the process server attempt to learn the result of such hearing by making a written or email request to the party on whose behalf the challenged service of process was made for a report of the result, and if the process server is notified, to forward it to the court. We suggest modifying this change, by adding a requirement that the process server check the court file 30 days after the date

that the court has scheduled a traverse hearing to ascertain whether there is a decision or settlement on the service issue, and if there is such a decision or stipulation in the file that the process server be required to forward a copy of it to DCA. If such a decision or settlement is not in the file, the process server should be required to check the court file 60 days after the date that the court has scheduled a hearing, and if there is a decision or stipulation in the file at that stage, the process server should be required to forward it to the agency.

Concerns

The amendment to Section 2-233a(b)(4) simplifies the alternative method for licensees to maintain unalterable electronic records by permitting them to make two copies of the records on CD-Rom, DVD-Rom or another other once write medium, one copy of which must be stored off site. The current rules require copying of the document to a portable media device, maintained in a manner designed to ensure its security and preservation. The Committee is concerned about this modification because CDs are easily damaged. In addition, the presence of multiple copies could result in there being differing versions of the same records.

Typographical Error

2-33a Electronic Records (b)(3) Lines 8 and 9 state "that the records shall contain such separate fields with parameters as follow." Instead, the sentence should state "that the records shall contain such separate fields with parameters as follows."

Conclusion

Thank you for giving the Civil Court Committee of the New York City Bar Association the opportunity to comment on the proposed amendments to the process server rules. 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 amendments.