Department of Consumer Affairs

Statement of
Andrew Eiler
Director of Legislative Affairs
Department of Consumer Affairs
before the
City Council Committee on
Consumer Affairs
on
Intro 1037

November 13, 2009

Good morning, Chairman Comrie, and committee members. I am Andrew Eiler, Director of Legislative Affairs for the Department of Consumer Affairs. Commissioner Mintz asked me to thank you for the opportunity to appear before you at your hearing on Intro 1037, which seeks to strengthen the process servers licensing law that the Department enforces.

We are pleased that the Council shares our concerns about the process server industry, which the Department of Consumer Affairs has licensed since 1970. Currently, the Department has issued 2,081 licenses to individual process servers and 143 licenses to process server agencies. Process servers are, however, only one part of the overall landscape of debt collection industries. The Department's heightened concerns about this industry were triggered by our examination of the debt collection industry and the widespread extension of consumer credit. Technology has allowed the debt collection industry to easily file cases and obtain judgments against the growing numbers of alleged debtors who became entangled in, and then allegedly defaulted on, their credit contracts. Indeed, almost 90 percent of consumers in consumer credit actions in New York City failed to appear to defend themselves in 2007.[1] Process servers are only one part of the overall landscape of debt collection industries.

From FY '06 to FY'07, the Department recorded an 18% spike in the number of complaints docketed against collection agencies. By FY' 08, docketed complaints catapulted into first place on DCA's list of top five complaint categories, with complaints increasing from 908 in FY' 06 to 1,266 in FY '08. In June 2006, the Department held a

[1] *See* MFY Legal Services, Justice Disserved (June 2008) (available at http://www.mfy.org/Justice_Disserved.pdf).

public hearing on debt collection, which highlighted a number of predatory and illegal practices in which debt collection agencies were engaged.

Based on information gathered from that hearing, DCA formulated proposals and worked with the Council to include them in legislation signed by the Mayor in March 2009. The new law enhanced the Department's ability to curtail predatory practices by expanding its reach to license debt buyers as collection agencies and strengthening the requirements governing debt collection practices.

Enhancing the law protecting consumers against the predatory practices of debt collection agencies that were using non-judicial process to collect consumer debts is, however, only the first step in the battle to curb predatory debt collection practices targeted to consumers. The next step is to curb the illegal practices of process servers hired by debt collection agencies when they use judicial rather than non-judicial process to collect debts from consumers.

The most predatory practice in the arsenal of process servers is sewer service: the false claim by process servers that they properly notified consumers they were being sued by collectors when they in fact failed to do so. Sewer service creates the most serious harm to consumers by enabling debt collectors to obtain judgments by depriving them of an opportunity to respond and defend themselves against creditors' claims. Protecting consumers against the abuse of sewer service goes hand in hand with protecting consumers against abusive debt collection practices.

In June 2008, the Department held a public hearing on process server practices, which broadened its inquiry into abusive debt collection practices. The Department heard first-hand from consumers, advocates, judges and process server agencies and individual process servers themselves. Testimony presented at the hearing loudly and clearly identified two primary and critical areas of reform in process server practices: the need to improve and update current requirements for documenting that the process server indeed served process as claimed; and the need to address the fees companies currently pay for serving process, particularly what they pay for attempted but ineffective service. The Department's hearing and subsequent investigations revealed that many process servers are paid no more than $3.00 for service attempts, an amount so low it creates a strong disincentive to make bona fide service attempts.

In addition, I would also note that, the Department has been pursuing a broad process server enforcement strategy, including subpoenas, violations, aggressive settlements which incorporate novel remedies, license revocation proceedings, and other ongoing investigations.

Intro 1037 calls for a number of requirements designed to stem the tide of consumer abuse. Because those suggestions do not address the primary problems we have identified as harming consumers, however, we suggest working together to reshape this legislation. A few specific notes of concern may be helpful:

- First, the licensing of process server agencies suggested in the bill is, of course, a moot point, as agencies are already licensed by the Department.

- Second, while requiring individual process servers and agencies to obtain bonds may appear at first blush to be an effective protective measure for consumers, we believe such a requirement is ineffective because it is based on the faulty premise that financial security for the payment of fines and the award of damages for consumers is needed. That's simply not the problem, particularly when noting that most consumers aren't even aware they've been the victim of sewer service.

- Third, the proposal to extend the time frame for maintaining records to seven years would not be helpful, because we know from testimony and experience that the main issue regarding records maintenance by process servers and agencies is not how long such records are retained, but whether the records adequately and properly document actual service. In its current form, the proposal fails to address this key issue. In addition, this proposal might be inconsistent with State law provisions that already provide for a shorter record retention requirement.

- Finally, the requirement that the Commissioner prepare a handbook of all laws governing the service of process to be distributed to all process service agencies is ill-advised. DCA has a proud tradition of educating businesses, including multiple outreach opportunities and, where necessary, interpretation letters But in this case, DCA is simply not the appropriate agency to be tasked with creating the broad-based handbook suggested here, especially given the numerous State laws of general applicability that govern service of process. As a practical matter, the Department is not well positioned to analyze all the cases that impact on process servers' understanding of the law and therefore, the handbook would be quickly dated. Finally, we are exploring other ways in which process servers can obtain training that would advance the industry's understanding of the law.

The Department appreciates this opportunity to testify today and greatly looks forward to working with the Committee and the Council to ensure that together we craft legislation that effectively protects consumers against the predatory practices in the process server industry.

I will be happy to answer your questions.

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Introduction

Good morning. My name is Harvey Epstein; I am the Project Director of the Community Development Project at the Urban Justice Center. The Urban Justice Center is a project-based umbrella legal services and advocacy organization serving New York City residents. In the past 25 years, the Urban Justice Center has provided direct legal assistance, systemic advocacy and community education on a variety of issues to low and moderate income New York City residents. The Community Development Project (CDP) of the Urban Justice Center formed in September 2001 to provide legal, technical, research and policy assistance to grassroots community groups engaged in a wide range of community development efforts throughout New York City. Our work is informed by the belief that real and lasting change in low-income, urban neighborhoods is often rooted in the empowerment of grassroots, community institutions.

Our Clients

The far-reaching harms of sewer service have been felt by many of our clients. We have witnessed a clear pattern, in which the failure to serve process has left people unaware of the lawsuits against them, until after default judgments were issued and cases were closed.

For example, one of our clients, Mr. ES, obtained a copy of his credit report only to find that the first item listed was a judgment. Prior to seeing his credit report, Mr. ES had not known that he had even been sued. Mr. ES was applying for jobs and had been unable to obtain employment. Many employers to whom Mr. ES applied required access to his credit report and considered his report in determining whether to extend him an offer of employment. When Mr. ES learned of the judgment on his credit report, he was able to find free legal representation. As a result of that representation, the judgment was vacated and the creditor agreed to discontinue the action.

In another example, in January 2006, Mr. OC was told that his wages would be garnished. Mr. OC had never received notice that he had been sued. According to the plaintiff's filings, the process server claimed to have served a non-existent person on a date when Mr. OC's entire family was out of the country, in the Dominican Republic. As a result of his blemished credit, Mr. OC, who was in the process of starting his own business, had trouble raising the necessary capital for his venture. Once represented by the Urban Justice Center, Mr. OC entered into a mutually acceptable settlement and payment plan with the creditor.

Recurring Patterns of Victimization

Anyone can be the victim of sewer service, but vulnerable groups such as the elderly, disabled and working poor families are disproportionately affected. Frequently these individuals are unaware of their legal rights and lack an understanding of the legal system. We find instances of sewer service most frequently in matters of debt collection, property foreclosures and evictions.

Sewer service is a problem that has plagued New York City residents, literally for decades. The industry is in great need of reform. We should safeguard the due process rights of every New York City resident, and ensure that they are able to address complaints issued against them. In order to this, we must regulate and control the work of process servers, and we must require that process servers and agencies post bond.

The Bill

Bill Number 1037, currently pending before the New York City Council, will provide all New York City residents with additional protections but does not go far enough. I support Section 406.1 which requires the furnishing of a surety bond in order to obtain a license. The bond will be available to cover fines and penalties for violations by the process server or agency. It will also cover final judgments recovered by New York City residents for damages caused by a process server or agency's violation. The bond will also provide the city with revenue, by ensuring that fines are paid on time. Fines alone have consistently proven insufficient to stop sewer service. The bond will substantially increase accountability in an industry, where individuals and companies now routinely violate the law without consequence.

The new requirement of a surety bond will interject private sector supervision and enforcement alongside the DCA's. The underwriting standards established by surety companies will be an independent supplement to current enforcement. If and when the DCA is faced with budget cuts, private enforcement will remain intact.

Finally, required surety bonds will help to drive out current "bad apples" from the industry. Surety companies may demand higher premiums and collateral from unreliable process servers and agencies. The surety companies may deny coverage altogether if the individual or agency falls below the surety company's professional standards. This will deter unscrupulous people from entering the industry and will be an incentive for current process servers to follow the law.

I support Section 406.2.b. which requires process serving agencies to provide employees with a written explanation of extensive employee rights and employer obligations pursuant to state and federal laws. This new requirement may help low-wage employees, most vulnerable to violations of employment rights. I also support the requirement which provides for annual employee training, which will foster knowledge and professionalism and increase agencies' accountability for the actions of its employees.

Section 406.3 requires process servers and agencies to retain records for at least 7 years. This section will provide assistance for people who don't realize that a default judgment has been entered until many years later. If the person who was improperly served wishes to contest the bad service, records of the process server describing the service should be available.

Finally, I am in favor Section 406.4 which calls for the development and distribution of a Handbook. There are many laws and rules governing the service of process in New York State and New York City. Process servers are not lawyers and so this task is best delegated to the DCA to ensure that information is accurate and complete.

However, this modest change to the oversight of process servers does not go far enough to protect the public from rouge process servers. We support the following four additions.

Recommendations to improve the bill

First, there must be a private right of action. While the bonding requirement is a powerful method of guaranteeing compliance, there are clear limitations on the DCA to bring enforcement actions. The bill must include a private right of action for individual victims of sewer service, so they will be able to make claims against the bond.

There is precedent for such private rights of action in other sections of the NYC Administrative Code. Some examples of this are at § 20–743.1 Civil Cause of Action and NYC Administrative Code § 20-401. Both create a private right of action against a tax preparer for improper filing and grant victims injunctive relief as well as actual and punitive damages and attorney's fees. This, more than anything, else will prevent process servers from using sewer service.

Second, the process servers should be required to annually file their logs with the Department of Consumer Affairs. This ensures that the documents are available to the DCA for review if questions arise around the credibility of a process server. This will also benefit the public since process servers will know that their logs are reviewed by the agency that licenses them.

Third, I recommend that process servers be required to photograph the location where alleged process occurs with a digital camera, that states at the bottom of the photograph, the exact

location (via GPS-like technology), date and time that the photograph was taken. This technology fits into regular cell phones or digital cameras and costs about $130. Alternatively, all process servers could be required to use a cell phone, imbedded with a GPS chip. Either way, this locating technology would create a digital record of the locations and times, where and when the process server claims he served or attempted to serve process. It will create strong incentive for process servers to abide by the law and provide a more accurate and efficient system of record keeping. We are not recommending this *instead* of a surety bond or other requirements. We are recommending that this technology be required *in addition* to the other measures.

Finally, an exemption from the bond requirement should be afforded to process servers employed at legal services and non-profit organizations (and those individuals who serve process less than 4 times a year), while serving process for such employers. Though these organizations are unlikely to fall under the definition of a process serving agency, the $10,000 bond required for individual process servers, serving five or more process per year, will likely be too burdensome for many of these low-overhead organizations.

Conclusion

These recommendations will ensure the due process rights of all New York City residents and afford us all the basic right to respond to claims brought against us and will protect vulnerable groups from potentially far-reaching, calamitous effects of sewer service. Thank you for introducing this bill and giving me the opportunity to testify on the important issue.

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TESTIMONY OF MFY LEGAL SERVICES, INC.

ON

INTRO 1037/2009

PRESENTED BEFORE:

THE NEW YORK CITY COUNCIL
COMMITTEE ON CONSUMER AFFAIRS

PRESENTED BY:

CAROLYN E. COFFEY
SENIOR STAFF ATTORNEY

November 13, 2009

My name is Carolyn Coffey. I am a senior attorney with MFY Legal Services' Working Poor Project and its Consumer Rights Project. Thank you for the opportunity to testify today about this important legislation.

MFY each year provides direct representation or assistance to over 6,500 clients in New York City. We provide legal training to thousands more. Our clients are primarily the poor and working poor, retirees and the disabled. Our clients routinely are the victims of improper service, otherwise known as "sewer service." Sewer service has long been a problem in the Civil Court of the City of New York, despite previous attempts to address it. Today sewer service is so pervasive that in many types of cases — debt collection cases in particular — it occurs more often than lawful service. Tens of thousands of New York City residents are subject to this abuse every year, most often in consumer debt collection cases and in Housing Court. For this reason, there is an urgent need for reform of the process serving industry.

Last year, MFY issued a Report titled, "Justice Disserved." (A copy is attached to my testimony.) This report looked at over 180,000 cases filed in the Civil Court and catalogued how default judgments due to improper service wreak havoc on the lives of many of MFY's clients, most of whom have low-income wages or rely solely on Social Security, SSI, Veterans Benefits or pensions for support. Our report focused on just seven debt collection law firms and we found a default rate that was extraordinarily high. Similarly, the Civil Court has reported a default rate of 76% in consumer debt cases. The repercussions of default judgments are devastating: instead of having an opportunity to defend themselves in court, consumers first learn of litigation against them when their wages are garnished or their bank accounts are frozen. Similarly, tenants in Housing Court often first learn of the case against them when they come home to find a notice of eviction tacked to their door.

Also last year, the New York City Department of Consumer Affairs held a public hearing on the process serving industry. Testimony of industry insiders — agency owners and process servers alike — confirmed that sewer service is widespread and commonplace. For example, Evan Cohan, a managing attorney at DLS, said, "Consumer debt collection is a big area for sewer service." He attributed this to the fact that the law firms hiring process servers in consumer debt collection cases are paying so little. Jay Brodsky, President of ABC Process Serving Bureau, said he pays "as low as" $3 per service, each of which may require a process server to return at least three times on different days and times. Samson Newman of Aetna Judicial Service said he pays $5 per service in debt

collection cases. Both Brodsky and Newman explained that the process servers they hire often do not get paid if service is not completed. Bob Gulinello, a licensed process server, said that when you pay a process server $5, you are "going to get fraudulent service and sewer service." He added that in such circumstances proper service "ain't going to happen." Of course, not all process servers and process serving agencies operate this way. One company testified to paying $50 per service and another to paying $45 per hour. Mr. Cohan of DLS explained that all his process servers are full time employees and his firm has "eliminated the incentive for sewer service, because [its] employees get paid regardless of their success. The incentive . . . to fabricate attempts is eliminated."

Nothing dramatizes the crisis of improper service in New York more than the filing by the Attorney General of *Pfau v. Forster & Garbus* on July 21, 2009, which seeks to vacate 100,000 default judgments across New York State which are tainted by fraudulent claims of service by a single process serving company.

MFY Legal Services urges the City Council to pass Intro 1037 which would require all licensed process servers to provide the Department of Consumer Affairs (DCA) with a $10,000 surety bond and would require process serving agencies to provide a $100,000 bond. These bonds would guarantee payment of fines levied by DCA and judgments issued against the process server or the process serving agency, increasing City revenues and guaranteeing repayment of victims who obtain a judgment against the individual process server or agency. New York City already has adopted a similar bond requirement for Laundries (NYC Adm. Code § 20-294), Home Improvement Contractors (NYC Adm. Code § 20-401(3)), Child-support Debt Collection (NYC Adm. Code § 20-494.1), Vehicle Towing Operator (NYC Adm. Code § 20-499) and the Booting of Motor Vehicles (NYC Adm. Code § 20-532.1).

Also, by requiring a bond, Intro 1037 will drive the "bad apples" out of the industry. Surety companies may require higher premiums and greater collateral from unreliable process servers and process serving agencies. Surety companies may even deny coverage if the individual or agency is unable to meet the surety company's professional standards. These new standards will help deter people who want to make a "quick buck" by entering the process serving industry and undercutting honest process servers by flouting the legal requirements for services. They will similarly be an incentive for such people already in the industry to leave. The requirement of a surety bond will substantially increase accountability in an industry in which individuals and companies now routinely violate the law with virtually no penalty.

Right now, many individual process servers are actually "employees" of the agencies that hire them, but they are denied their employment rights of a minimum wage, social security and other protections because process serving agencies improperly treat them as "independent contractors." With an individual bonding requirement under Intro 1037, this abuse will end because these low-wage individuals will likely not be able to obtain their own surety bond. Instead, they only will be able to work if the process serving agency that hires them acknowledges that they are employees, covers them under its own agency bond, and on this basis the process server seeks a license from DCA.

The bill also requires process serving agencies to provide employees with information about their rights as workers, including their rights under wage and hour laws, and to provide annual training regarding the laws pertaining to lawful service of process. Because employees will be informed of their rights, agencies that underpay and misclassify their employees will have a greater risk of being held accountable. This will serve to reduce or eliminate the incentives that have made bad service inevitable. Knowing that they have a $100,000 bond at risk will encourage process serving agencies to comply with employment laws and hire responsible employees and will encourage supervision of their employees and compliance with the training mandate of Intro 1037.

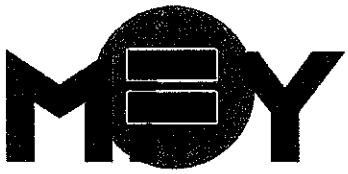
Finally, we believe the bill can be strengthened by making it easier for injured victims of sewer service to recover damages, which Intro 1037 will insure are paid because of the new bonding requirement. One way to strengthen the bill is to create a right of action similar to that found in NYC Adm. Code § 20-743.1, which establishes a private right of action for consumers who have been injured by the failure of a tax preparer to follow laws concerning refund anticipation loans. Another option is to authorize the DCA to award treble damages to people who are the victims of sewer service. A similar right to up to treble damages exists for the victims of improper home improvements under NYC Adm. Code § 20-401. We know that the Committee will be hearing suggestions from other supporters of Intro 1037 to strengthen the bill. MFY supports these suggestions as well.

In conclusion, MFY Legal Services urges the adoption of Intro 1037. If Intro 1037 is enacted with the strengthening amendment we propose, the Council will have taken a dramatic step forward in protecting New Yorkers from the harms of sewer service and in ensuring that those individuals who are still the victims of this practice can be compensated when they are harmed.

Again, thank you for the opportunity to testify today.

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



MFY LEGAL SERVICES, INC.
Consumer Rights Project
June 2008

Summary of Findings and Recommendations

As the third party debt collection industry has grown, the number of Civil Court cases filed in Civil Courts in New York City has skyrocketed. In 2007, 597,912 civil cases were filed, almost three times the number filed in 2000.

MFY Legal Services, Inc. reviewed available computer data on civil court cases filed in the Bronx, Brooklyn, Queens, and Staten Island in 2007. Troubling trends emerged:

- Seven law firms filed 180,177 cases in the four boroughs studied, 30% of the total cases filed
- Of the 180,177 cases filed, only 15,443 (8.57%) defendants appeared in court
- Nine creditors that frequently sue in the Civil Court (comprising 122,166 cases) were reviewed: the percentage of defendants appearing in court ranged from 5.41% to 9.46%
- A review of a random sample of 91 court cases raised serious questions about the propriety of service by process servers hired by plaintiff debt collectors and the accuracy of their records.

In 2007, MFY Legal Services provided advice, counsel and representation to more than 350 clients who were being sued in debt collection cases. Of these, none had been served properly with a summons and complaint and most did not know that a lawsuit had been filed against them until their bank accounts had been restrained.

Default judgments due to improper service wreak havoc on the lives of many of MFY's clients, most of whom have low-income wages or rely solely on Social Security, SSI, Veterans Benefits or pensions for support.

The civil justice system is based on the principle that defendants will have an opportunity to be heard in court before a judgment and action to collect on a purported debt is taken against them. It appears that nine out ten New Yorkers who are sued in the Civil Court of the City of New York are being denied their right to be heard because of possibly illegal process serving practices.

Based on our findings, MFY Legal Services recommends that the New York City Department of Consumer Affairs (DCA), which licenses process servers, strengthen its oversight of process servers by implementing the following policies and practices:

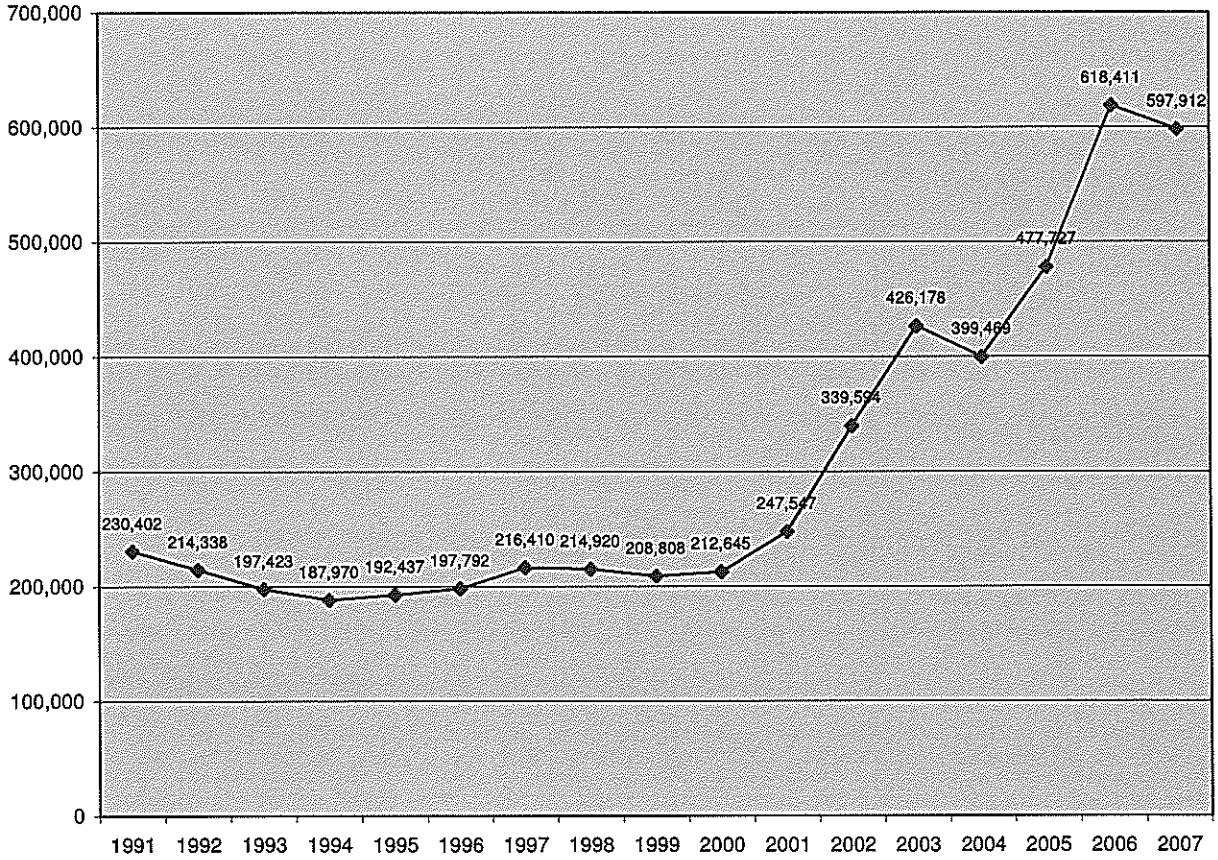
- Conduct comprehensive audits of process server companies and licensed individuals prior to renewal of their license every two years.
- Require process servers to designate DCA as agent for service pursuant to CPLR 318.
- Require record keeping for seven years rather than two years.
- Require process servers to record in their record book how they determined the residence served is the actual residence of a defendant.
- Immediately establish a joint task force with representatives of the Civil Court, DCA, consumer advocates, debt collectors and the process servicing industry to investigate the scope of the problem identified in this Report and to recommend additional solutions.
- Examine the results of the recent amendment to the Uniform Rules for the New York City Civil Court requiring additional notice to defendants in consumer credit transaction cases, and compare those results to affidavits of service filed in those cases.

1. The Data

Growth of Debt Collection Industry

Debt collection is a major growth industry. Debt collectors buy billions of dollars in debt from credit card companies and others each year for pennies on the dollar. Debt collectors earn huge profits even if they collect on only a small percentage of the debt they have purchased. Traditional debt collection practices—contacting the debtor by mail and phone, negotiating and monitoring a payment plan—are labor intensive and time consuming. Over the past five years debt collectors have opted for a quicker approach—filing tens of thousands of lawsuits against alleged debtors. The following chart shows the increase in Civil Court filings in New York City, a large number of which is attributable to consumer debt collection filings:

Cases Filed in the Civil Court of the City of New York (excluding Landlord/Tenant and Small Claims Court Actions)



Concentration of the Debt Collection Industry in New York City

Close to one-third of all cases filed in Civil Court of the City of New York in 2007 were handled by seven law firms, based on MFY's review of cases filed in Bronx, Kings, Queens and Richmond counties:

Law Firm	Total Cases Filed
Mel S. Harris & Assoc., LLC	43,506
Cohen & Slamowitz, LLP	41,480
Rubin & Rothman,LLC	31,661
Forster & Garbus	30,032
Wolpoff & Abramson, LLP	19,028
Pressler & Pressler	8,647
Eltman, Eltman & Cooper	5,823
Total	**180,177**

Rate of Response by Defendants to Debt Lawsuits

Based on a review of seven law firms and nine creditors MFY commonly encounters in debt collection cases, an appallingly small percentage of defendants appeared in court in response to these lawsuits:

Seven Law Firms Reviewed

Law Firm	Total No. of Cases Filed	Total No. of Defendants Appearing in Court	Percentage of Defendants Appearing in Court
Pressler & Pressler	8,647	519	6.00%
Cohen & Slamowitz, LLP	41,480	2,836	6.84%
Eltman, Eltman & Cooper	5,823	454	7.80%
Mel S. Harris & Assoc., LLC	43,506	3,808	8.75%
Rubin & Rothman, LLC	31,661	2,941	9.29%
Forster & Garbus	30,032	2,866	9.54%
Wolpoff & Abramson, LLP	19,028	2,019	10.61%
Total	**180,177**	**15,443**	**8.57%**

Nine Creditors Reviewed

Creditor	Total No. of Cases Filed	Total No. of Defendants Appearing in Court	Percentage of Defendants Appearing in Court
Metro Portfolio	2,700	146	5.41%
Midland Funding	26,998	1,698	6.29%
Crown Asset	399	28	7.02%
Capital One Bank	32,088	2,360	7.35%
Erin Capital	6,011	452	7.52%
RJM Acquisitions	1,340	103	7.69%
LR Credit	30,635	2,525	8.24%
Palisades	10,376	884	8.52%
LVNV Funding LLC	11,619	1,099	9.46%
Total	**122,166**	**9,295**	**7.61%**

How a Defendant Is Served with the Summons and Complaint Appears to Depend on the Process Serving Company

A review by MFY of court files from the Civil Court in Queens and Kings counties show questionable patterns in the way process servers allegedly serve summons and complaints in consumer debt collection cases:

Process Serving Company	No. of Defendants in Sample Who were Allegedly Served	Service by "Nail and Mail"	Service Upon a Person of Suitable Age and Discretion	Service Upon the Defendant by Personal Delivery to Him or Her
Company No. 1	30	17%	83%	0%
Company No. 2	27	93%	7%	0%
Company No. 3	34	18%	64%	18%

The Courts Are Conducting Few Hearings to Test Improper Service by Process Servers

When defendants appear in court and say they were not properly served with the summons and complaint, the court must conduct a hearing to determine whether it has "jurisdiction" to proceed with the lawsuit. This hearing is called a "traverse hearing." While defendants may waive a traverse hearing and proceed in court to defend their case, MFY has assisted clients who say they were discouraged either by plaintiffs' attorneys or others from asserting their right to a hearing. Because many debt collection cases concern disputes that are past the statute of limitations, MFY has observed that many plaintiffs with old lawsuits would be permanently barred from re-filing their cases if defendants in these cases had asserted their right to a traverse hearing and won. The number of traverse hearings conducted in the Civil Court, in light of the apparent low rate of proper service of the summons and complaint by process servers, is surprisingly low.

County	No. of Traverse Hearings Scheduled by the Court
Bronx (September 24, 2007 to May 22, 2008)	0
Kings (March 13, 2007 to May 22, 2008)	90
Queens (June 4, 2007 to May 22, 2008)	53
Richmond (November 13, 2007 to May 22, 2008)	0

The exceptionally low rate of response by defendants to debt lawsuits raises serious questions. Do over 90% of New Yorkers being sued for debt simply ignore legal notices? While a handful of defendants might inadvertently ignore a legal notice, after 45 years of practice, MFY Legal Services has found that New Yorkers take legal notices seriously and respond by going to court or contacting an attorney for advice and assistance. MFY's own experience in the consumer law arena shows that the defendants do not appear in court because they are unaware of the lawsuit due to improper service.

2. Process Serving

New York State's Statute Regarding Service

CPLR § 308 states the various methods that personal service of a summons upon a natural person may be effected. Specifically, service may be made by:

- Personal Service CPLR § 308(1): "by delivering the summons within the state to the person to be served;" or
- Substitute Service CPLR § 308(2): "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served," and by mailing the summons to the person to be served at his or her last known residence or actual place of business; or by
- "Nail and Mail" CPLR § 308(4): where service under the first two options cannot be made with "due diligence," service may be effected by "affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode" of the person to be served, and by mailing the summons by first class mail.

Process Servers Rarely Make Personal Service

In order to understand the cause of the exceptionally low rate of response by defendants to lawsuits, MFY staff examined a random sample of 91 consumer debt collection court files to determine the method of service. In a preliminary test, we reviewed court files of cases filed in Queens and Kings counties. Because collection companies tend to purchase a large number of index numbers at a time, we attempted to look at multiple cases handled by the same process serving company. MFY picked three process serving companies at random. The files indicate that personal service was rarely made. Service to a person of suitable age and discretion accounted for 54 percent of the cases, while "nail and mail" service was the standard practice in 40 percent of the cases, and personal service comprised only 6 percent.

Notably, process servers for two of the companies did not make personal service on any defendants, while one company managed to do so only in 18 percent of cases. Further, the type of service effected by one company in 93 percent of its cases was by "nail and mail," while another process server company served defendants by leaving the summons and complaint with a person of suitable age and discretion in 83 percent of cases.

MFY doubts the accuracy of many of the 91 affidavits it reviewed. For example, one process server almost exclusively served papers by delivering them to a person of suitable age and discretion rather than to the defendant, and in 90% of the cases the person allegedly accepting the papers was a woman. This suggests that some of the 91 affidavits of service were false. Further, in cases handled by MFY almost none of our clients ever were served with a summons and complaint in their debt collection lawsuits. In these cases, our clients provided us with convincing evidence that the process server affidavits were false. A very small fraction of MFY's consumer clients are served personally. Many defendants are served at former addresses, or addresses at which they have never lived, while others, for whom the process servers have the correct address, never received court papers through substituted service or even via the mail. Time and time again, consumers are notified of lawsuits when their bank accounts are frozen, or when they check the public records section of their credit reports and find out a default judgment has been entered against them. A review of the affidavits of service in these cases reveals service effected at former addresses, or on

individuals of suitable age and discretion, who are alleged "co-tenants" or "relatives" of the defendant, but who are not people the defendant knows.

The legal solution to challenge process server affidavits is for judges to conduct traverse hearings. However, often when a defendant files a motion to dismiss the action based on lack of personal jurisdiction due to improper service—and almost always when the defendant is represented by MFY— plaintiff creditors choose to dismiss or discontinue the case, rather than defend service. In fact, according to the Office of Court Administration, only 90 traverse hearings were scheduled from March of 2007 through May of 2008 in Kings County, and 53 hearings were scheduled in Queens from June of 2007 through May of 2008. Even more surprising, there were no reported traverse hearings in the Bronx from September 2007 through May 2008, and no hearings scheduled in Richmond County from November of 2007 through May of 2008. Further, even when scheduled, the vast majority of these hearings did not take place.

The Civil Court should be commended for recently amending the Uniform Rules for the New York City Civil Court to improve notice of lawsuits to defendants in consumer credit transaction cases before default judgments are entered. When they file proof of service, plaintiff creditors now must also submit to the clerk a notice and a pre-printed, stamped envelope addressed to the defendant, with the return address of the Court where the case is filed. The notice, in English and Spanish, states that a summons and complaint have been filed, and that judgment may be granted against the defendant if he or she does not appear in court. MFY's experience with this new initiative is so far positive, as several of our clients have reported receiving the notice, alerting them to the fact that a lawsuit has been filed. However, additional notice is not a substitute for proper service as required by law, and the rule change provides no remedy to the court's lack of personal jurisdiction over defendants when they are improperly served, or not served at all.

3. Case Studies

MFY's consumer debt cases follow a predictable pattern: a client only learns that a lawsuit has been filed and a default judgment issued when he or she attempts to withdraw money from a bank or use a debit card. Debt collection companies employ sophisticated technology to quickly issue information subpoenas to all banks in the city in order to find the bank account of the defaulted defendant. A frozen bank account wreaks havoc on the lives of low-income New Yorkers, and in many cases their bank accounts contain only Social Security income or other monies that are not even collectable. The following cases illustrate the trauma and hardship caused when improper service unleashes a devastating chain of events.

Victor A., 68, of Manhattan, is a blind, disabled senior citizen whose only source of income is Social Security and SSI. His first notice of a lawsuit against him by a debt buyer was when he attempted to withdraw money from an ATM to pay for medication and learned that two of his bank accounts had been frozen. He was unable to buy the medication, which he needed for a follow-up procedure to an operation for colon cancer. He also was unable to pay his rent for the month, and could not pay his bills. The affidavit of service stated that a person of suitable age and discretion, "John Doe- co-tenant," had been served at his address. Mr. A lives alone and only leaves the house with the help of a home attendant, and knows nobody who fit the description of the "co-tenant" supposedly served. His bank account was frozen for weeks until MFY convinced the debt collection attorney to release his account by sending them proof of his only source of income.

Jane X., 39, of Manhattan, is a slight, Caucasian woman of Eastern European ancestry who lives on the Upper West Side. She first learned of a lawsuit against her by a debt buyer when her bank account was frozen and she was unable to withdraw money out of an ATM. The affidavit of service

filed in the action stated that she was served personally and described her as an heavy-set African American woman. MFY advised her to file an order to show cause to have the judgment vacated based on the obvious failure to serve her with the summons and complaint.

Dorothy Y., 70, of Manhattan lives in senior housing and her only source of income comes from her Social Security benefits. She first learned of a lawsuit against her on an old Chase card when she received a letter from her bank, informing her that her account had been frozen. Because she had no access to her funds, she was unable to pay bills or her rent on time. The action had been filed in Queens County Civil Court, and the affidavit of service stated that she had been served at an address in Queens from which she had moved seven months earlier. The affidavit of service did not specify which apartment had been served, but described a person of suitable age and discretion whom Ms. Y. did not know or recognize. The case was put on for a traverse hearing three times, but inexplicably adjourned, requiring Ms. Y to keep coming back from Manhattan to appear in Queens. MFY finally represented her at the third scheduled traverse hearing, and the action was dismissed after the hearing.

Chen Z., 35, of Manhattan, discovered that he had been sued by Capital One in 1994 only when he returned from a short trip to China in 2007 and discovered that his bank account was frozen and a City Marshal had remitted the funds to the attorney for Capital One. The affidavit of service stated that he had been served in 1994 at an address where his sister had once lived, but where he had never resided. The summons and complaint had allegedly been taped to the door, and the address had supposedly been confirmed by a "Ms. Lee" whom he did not recognize and whom his sister did not know. Because it was such an old case, he had to wait months to get his bank account released while he waited for the file to be requisitioned from the Civil Court. In the meantime, he depended on his friends and family to support him while he had no access to his bank accounts.

Tracy C., 40, of Manhattan is a single mother working two jobs to support her son. She first learned of a lawsuit against her by Capital One when she was at the checkout counter at Pathmark, buying groceries, and tried to use her debt card. The affidavit of service in the case stated that she had been served at her apartment by affixing the summons and complaint to her door. It further stated that the address was confirmed by an unnamed neighbor with no description, and that the process server confirmed Ms. C.'s apartment by seeing her name on the door. Ms. C. does not have her name on her door for privacy reasons, and does not know her neighbors. Ms. C. filed an order to show cause, but in the meantime, while the motion was pending, she had no access to her funds and could not pay her bills, rent or her son's expenses.

Christina K., 37, of Chicago, Illinois, first learned of a lawsuit filed against her in 2007 in New York County Civil Court when she tried to use an ATM in Chicago and found that her account had been frozen. The affidavit of service filed in the case stated that a person of suitable age and discretion had been served at an address in New York that she had not lived at in over ten years. Because she was in Chicago, she had a difficult time finding legal assistance in New York, and her bank account remained frozen for weeks. MFY agreed to assist her in sending proof of her address at the time of service to the Plaintiff's lawyers, and eventually they agreed to dismiss the case against her.

George M., 57, of Manhattan, became disabled and unable to work approximately four years ago; he is now homebound because he is unable to walk without great difficulty. He discovered that a judgment had been entered against him by a debt buyer when his bank account was frozen. The affidavit of service states that the process server served Mr. M. via substitute service by delivering the summons and complaint to a woman in his home. However, Mr. M. does not know of anyone with the woman's name, or who fits the physical characteristics described in the affidavit. Because he is homebound and rarely leaves his apartment, Mr. M. is fairly certain he was home on the day he was allegedly served. As a result

of this improper service and subsequent freezing of his bank account, Mr. M. had to borrow money from his son to pay his rent and bills. MFY represented Mr. M. and scheduled a traverse hearing to contest service, however, the morning of the hearing, the plaintiff agreed to dismiss the case.

Violet S., 49, of Atlanta, Georgia discovered when her joint bank account was restrained in March of 2008 that a judgment had been entered against her in civil court in Manhattan in a case filed against her in 2007. The affidavit of service indicates that the process server served her by affixing a copy of the summons and complaint on the door of her actual place of residence in New York, New York, and later mailed her copy to that same address. Mrs. S. has lived in Georgia for the past 20 years. As a result of the default judgment that had been improvidently entered against her, Mrs. S. had to seek legal assistance in both Georgia and New York. When MFY appeared in the case on her behalf, the plaintiff agreed to vacate the judgment and to dismiss the case with prejudice.

Linda L., 29, of the Bronx, found out a judgment had been entered against her when she attempted to withdraw money from an ATM in January of 2008 and discovered that her bank account was restrained. The affidavit of service states that the process server served her by delivering the summons and complaint to a person of suitable age and discretion at an address Ms. L. had not lived at since 2000. As a result of losing access to her income, Ms. L. struggled to support her five children, and had to rely on family members to get her through the ordeal. MFY represented Ms. L, and rather than schedule a traverse hearing, the plaintiff agreed to dismiss the case.

Ira K., 61, of Manhattan, was denied public housing in 2007 because a judgment had been entered against him in a case filed in 2005, which affected his credit rating. He never knew he had been sued until long after the default judgment was entered. The affidavit of service indicates that the process server served Mr. K. by delivering a copy of the summons and complaint to a person of suitable age and discretion at his dwelling place and by mailing him a copy. Mr. K. lives alone, is friendly with all of his neighbors, and does not know the woman who allegedly accepted service for him. When MFY intervened, the case was dismissed because the plaintiff abandoned its claim. However, Mr. K. lost his eligibility for public subsidized housing because the process of vacating the judgment and dismissing the case took longer than the time frame allowed by the housing agency to correct his credit report.

Terry E., 51, of the Bronx, discovered that he had been sued on an old credit card debt for which the statute of limitations had run out, when his bank account was frozen. Supposedly Mr. E. had been notified of the lawsuit when a process server served a summons and complaint on a person of suitable age and discretion who allegedly lived with Mr. E. Mr. E. is a working single father who lives with his two young children and does not recognize the description of the woman to whom service had supposedly been made. While his bank account was frozen as a result of the default judgment obtained through improper service, Mr. E. was unable to pay his bills, including children's tuition, for several weeks. With MFY's assistance, Mr. E. asserted the defense of improper service, and the plaintiff agreed to dismiss the case.

4. Recommendations

Although MFY Legal Services' investigation is preliminary and further research is needed, the data collected to date raises serious questions about the reliability of process serving practices. The New York City Department of Consumer Affairs is responsible for licensing and monitoring process servers. We believe, therefore, that DCA should take the lead in addressing this problem. We therefore recommend that DCA:

1. Conduct comprehensive audits of process server companies and licensed individuals prior to renewal of their license every two years. The problem of improper service is so severe that the DCA should conduct individualized audits of companies and individuals at the time of their biennial registration. The audit should be under oath and should review the process server's compliance with record keeping and evidence of their actual conduct in serving process.

2. Require process servers to designate DCA as agent for service pursuant to CPLR 318. Many process serving companies and individuals reside outside New York City. To serve legal papers, such as subpoenas, residents of New York City must investigate where the company or individual is to be found and then hire a different process serve to serve the papers. If the DCA were designated as agent for service, residents would be able to deliver legal papers to the Agency, ensuring that the licensed process servers and individuals still have records when service is reviewed by the court.

3. Require record keeping for seven years rather than two years. Based on MFY's experience, many defendants may not learn about a judgment entered against them by default until more than two years after the summons and complaint allegedly was served. Law firms and attorneys are required to keep records for seven years. Since service of process is an important component of the legal procedure, records relating to the service of process should also be retained for seven years.

4. Require process servers to record in their record book how they determined the residence served is the actual residence of a defendant. Based on MFY's review of 91 cases in Queens and Kings Counties, and the experience of our own clients, service of process is always allegedly made by leaving papers with a person of suitable age and discretion or by "nail and mail" at the defendants "actual" residence. In many cases, the residence is not the actual residence, because the process server relied on old or incorrect information. The DCA should issue a new rule describing acceptable methods for verifying a defendant's residence and require the contemporaneous recording of relevant information in the process server's log book.

5. Immediately establish a joint task force with representatives of the Civil Court, DCA, consumers, advocates, debt collectors and the process servicing industry to investigate the scope of the problem identified in this Report and to recommend additional solutions. All of the parties listed have relevant information about how process is served in New York City and they should share an interest in resolving the problems describe in this Report.

6. Examine the results of the recent amendment to the Uniform Rules for the New York City Civil Court requiring additional notice to defendants in consumer credit transaction cases, and compare those results to affidavits of service filed in those cases.

5. Comments and Methodology

In response to the New York City Department of Consumer Affairs' Notice of Public Hearing dated May 19, 2008, to "assess the nature and extent of abuses in the process server industry," MFY Legal Services is providing a preliminary analysis of civil court data. The data is derived from publicly available information on the New York State Unified Court System E-Courts website; information provided to MFY by the Clerk's Office of the Civil Court of the City of New York; information provided by the New York City Department of Consumer Affairs; and information collected by MFY by reviewing court files in the Civil Court Clerk's Offices in Queens and Brooklyn that were randomly selected by MFY.

MFY reviewed more than 180,000 electronic files that are accessible on the E-Courts website (www.nycourts.gov/index.htm). This data is retrievable in limited ways. MFY conducted searches by year and county with the data sorted by E-Courts to show in chronological order those cases where the defendant made an appearance. Because the E-Courts system currently provides information from only four of the five counties of the City of New York (New York County is not publicly available), MFY was unable to determine the total number of cases filed by law firms or creditors. However it is reasonable to assume that with the inclusion of New York County in the count of cases, the numbers reported would be substantially higher. Moreover, the sample studied in this preliminary report represents roughly one-third of the total number of cases filed in 2007 in the entire five counties, so it fairly represents the circumstances citywide.

A total of 91 case files from the Queens and Brooklyn Civil Court Clerk's Offices were reviewed by MFY as well. The 91 files were compiled from three groups of between 30-40 cases picked by their consecutive index numbers. Consecutive numbers were used in order to track a single process serving company or process server, because these numbers are usually purchased consecutively in large blocks.

MFY also reviewed its own case data pertaining to individuals seeking our services. In the past 12 months, MFY has provided advice and representation to over 350 clients who were being sued in debt collection cases. In nearly every case where the client was sued in a lawsuit filed in the Civil Court before coming to MFY, our clients first learned of the case against them when their bank account was restrained as a result of a default judgment entered against them. For these clients, the consequences often are dire since the money frozen in their bank accounts is needed for food, rent, medication or other necessities.

In addition, MFY requested information from the New York City Department of Consumer Affairs to determine whether the number of individuals licensed to serve process in the City of New York has kept pace with the three-fold increase in the number of lawsuits filed in the Civil Court. The Department was unable to provide this data in time for this Report.

An in depth explanation of the impact of debt collection lawsuits filed in the Civil Court of the City of New York is found in "DEBT WEIGHT: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor," The Urban Justice Center (October 2007). In this report, 600 court files were randomly examined. With regard to the rate in which defendants appeared in court, the findings in this preliminary analysis of over 180,000 records is consistent with the rates found in the UJC report.

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THE PUBLIC ADVOCACY GROUP LLC

Testimony of

The Public Advocacy Group LLC (By Chad A. Marlow, Esq.)

on behalf of

The New York State Professional Process Servers Association

and

The National Association of Professional Process Servers

on

New York City Council Introduction 1037-2009

THE PUBLIC ADVOCACY GROUP LLC

Good morning members of the Committee on Consumer Affairs. My name is Chad Marlow, I am President of The Public Advocacy Group, and it is a great pleasure to be testifying before this committee again. I am very pleased to be here today representing both the New York State Professional Process Servers Association, the National Association of Professional Process Servers and their members throughout the state and nation.

Let me begin my testimony with a basic observation regarding Intro. 1037: this Committee would be hard pressed to find two organizations more supportive of the motives behind this bill than NYSPPSA and NAPPS. We wholeheartedly support the goal of protecting defendants, especially in debt service cases, from unscrupulous process servers and process serving agencies who are willing to illegally engage in "sewer service." Sewer service is a term that defines the practice of obtaining a default judgment against a defendant who was never been notified she was being sued. Specifically, this occurs when a process server lies to a court under oath by saying that he personally served a defendant with process when he knows such service was never made. It then appears to the court that the defendant has chosen not to contest the lawsuit, and an automatic judgment is rendered against the defendant. This practice is abhorrent to the thousands of honest, hard-working individuals who make their living in the process serving industry both in New York State and nationwide. Each time a case of sewer service occurs, its victim is deprived of the right to a fair hearing, the proper operation of the court system is compromised, and the reputation of the process serving industry is damaged.

Needless to say, this past summer, the entire New York State legal establishment was rocked when New York State Attorney General Andrew Cuomo sought to have approximately 100,000 default judgments issued in debt collection cases thrown out due to improper sewer service. And even though the illegal scheme was linked to one specific, Long Island-based process serving agency, American Legal Process, the reputation of the entire process serving industry was damaged in a way that will take years if not decades to fully recover from. The plain and simple fact is that my clients are victims of ALP's illegal scheme too. Not surprisingly then, they believe no penalty is too harsh for those who perpetrate this type of fraud. Above all else, the NYSPPSA and NAPPS want to see laws passed that are so strong they will scare off anyone who might consider engaging in sewer service in the future. Deterrence, created through the threat of substantial criminal penalties, is the key to addressing this problem.

That brings us where the theoretical meets the practical. Does Intro. 1037 help to achieve the goal of significantly strengthening the deterrents against sewer service or, despite its good intentions, does Intro. 1037 inadvertently decrease existing deterrents without adding new ones? Unfortunately, because of its rather significant shortcomings, if Intro. 1037 becomes law, it would not be part of the solution, but rather part of the problem.

The NYSPPSA and NAPPS are prepared to fight tooth and nail for any legislation that will prevent the few bad apples in our industry from once again spoiling the bunch. That being said, we cannot support legislation whose greatest achievement would be to create a sense of false security when, in fact, it does nothing consequential to prevent New Yorkers from becoming victims of sewer service.

In the interest of time, I will not be providing detailed testimony on all the elements of Intro. 1037 about which my clients have an opinion. Rather, I will focus on the most important points and will leave it to the bill memorandum I submitted along with my testimony to fill in the gaps.

Let me begin by discussing the single most troubling part of Intro. 1037: The bonding requirements found in §3. In short, §3's bonding requirements would require individual process servers to purchase a $10,000 surety bond and process serving agencies to purchase a $100,000 surety bond. The goal of these bonds, I would assume, is to guarantee some degree of financial compensation is available to future victims of sewer service. This approach, however, has three very significant problems. First, the surety bond requirement is focused on providing a financial *remedy* to victims of sewer service, but does nothing to *deter* sewer service in the first place.

Second, the bonding requirement is insufficient even to its presumed task. Had the infamous ALP obtained a $100,000 surety bond per the requirement of this bill, each of its victims would have been entitled to $1 in compensation. That wouldn't even pay the victims' subway fare to collect their checks.

The third problem with the bonding requirement is far and away its most serious. Surety bonds, such as those required by this proposed new section, are cheap – they generally run about $80-$100 per $10,000 of bonding. As such, Intro. 1037 would not only permit, but would require all individual process servers, for only $80-$100, and all process serving agencies, for only $800-$1,000, to purchase the equivalent of a "get out of jail free card" for civil lawsuits based upon sewer service. The bad actors in the process serving industry, which unfortunately do exist, will welcome this first-time opportunity to purchase surety bonds, which they would view as civil lawsuit insurance to indemnify them against court-imposed damages.

This would move the ball in precisely the opposite direction it should be heading: instead of creating greater deterrents to bad actions by unscrupulous process servers, Intro. 1037 would eliminate an important disincentive to engaging in improper service and, in so doing, would actually promote bad behavior. There is no doubt that a process server who, let's say, engages in sewer service in a $5,000 debt collection case will sleep far more soundly at night knowing (and I say this with apologies to State Farm), that "like a good neighbor, Intro. 1037's surety bonds will be there".

The goal of protecting the public and deterring bad-actors who might otherwise engage in improper service is better served by increasing the penalties applicable to those who knowingly engage in improper service. Presently, the New York State Attorney General can seek, and New York City-based courts can assess, only a $1,000 civil fine for such violations – an amount which is clearly inadequate. Although those who engage in improper service may also face criminal penalties for perjury as well as civil actions by aggrieved parties, the NYSPPSA and NAPPS strongly agree with the sponsors of this bill that the level of deterrence must be increased.

Does that mean we want higher fines for knowingly engaging in improper service? Yes it does. Much higher. Does that mean we want these people to serve jail time? You bet. For all we care, you can lock them up and throw away the key. Does that mean we want them to lose

their process serving licenses immediately and forever? Absolutely. One strike and these lawbreakers should be out of the industry for good. Of course, these new, stiff penalties should only apply to those who intentionally engage in improper service – as state law currently recognizes, it does not serve the public interest to severely punish those who make innocent mistakes.

Intro. 1037 can accomplish its important goals by eliminating its detrimental bonding requirements and replacing them with tough penalties that will unquestionably deter future bad acts. Should the City Council's attorneys conclude that the City of New York does not have the authority under the state constitution to increase penalties against those who engage in sewer service, the NYSPPSA and NAPPS are willing to join the sponsors of this bill in Albany to push for legislation that will enact these tougher penalties on a statewide level. And if we can go before the state legislature armed with a City Council resolution calling for tougher action, all the better.

To paraphrase the great Harvey Milk, "I know you're angry! We're angry!" But we cannot allow this anger to cloud our judgment. It is far better to secure an effective law from legislative body empowered to adopt the legislation we need, than to have the City Council pass a law that provides no increased deterrent to bad behavior or, worse still, undermines one of the few deterrents that currently exist.

The next section I would like to discuss is the provisions in §§1 and 2 of Intro. 1037 that require any individual process server or process serving agency who assigns or distributes process in New York City to hold a New York City process servers license and submit to the jurisdiction of the New York City Department of Consumer Affairs. Let me start with the part that we agree with: We have no objection to requiring any person or agency who actually distributes process within New York City to hold a New York City process serving license. We also have no objection to requiring any agency whose business is physically located in New York City to hold such a license. Where we do have a problem – and I want to stress that this is a serious concern of process serving agencies across this country, a fact I know because I am representing them here today – is with the requirement that any agency that *assigns* process that is eventually served in New York City must also hold a New York City process server license.

The extension of the licensing requirement to those outside the City who assign process would greatly expand the scope of New York City's current process serving license law. Presently, no non-New York City agencies hold such a license. The reach of this amendment is of the greatest concern when an agency has no other connection to New York City. It is adequate, for the purposes of protecting New Yorkers, to ensure that a license is held by all process serving agencies located in the City of New York as well as any and all businesses and individuals who actually serve process within the City.

Let me explain why this expansion is so troubling. In modern times, process serving is frequently a national undertaking. For example, a process serving agency in Atlanta that needs to serve process in Manhattan would hire an Albany-based "clearinghouse" agency to handle the service of process within the State of New York. That clearinghouse would in turn hire a "downstate" Long Island agency to oversee the service of process in New York City. Finally, the Long Island agency would hire a New York City-based process server to actually serve

process in Manhattan. Requiring the Atlanta, Albany and Long Island agencies to all hold New York City licenses (and, from time to time, to physically appear before the Department of Consumer Affairs in New York City for filings, record keeping reviews, to challenge alleged violations and to meet other legal requirements) is unnecessary, overly-burdensome and might not survive a court challenge.

Further, if all process serving agencies that assign service on a national level – which constitutes most agencies – are forced to pay $500 for licenses in New York City, other cites would likely follow suit with similar legislation (either because they think licensing is a good idea, to gain a new source of revenue primarily from out-of-state sources, or in retaliation against New York City – the "if you are going to tax our businesses we sure as heck are going to tax yours" response)). If enough localities adopt similar legislation, it would dramatically increase the cost of serving process for consumers and would drive enumerable agencies out of business.

Presently several states, counties and one city other than New York require the licensing of process servers (a list of those entities is attached as Appendix A to the bill memorandum I provided you). Not one of these states, counties or cities extends its licensure requirement to companies and individuals who are not physically located in or directly serve process within their jurisdiction. By levying this fee, which is a tax, against businesses that neither operate in or do business in New York City, this body would create a dangerous precedent that could not only harm the process serving industry but could be extended to harm other regulated industries as well. Further, such a broad extension of the City's licensing powers beyond the borders of New York City may violate the City's statutory authority under the laws and constitutions of the United States and New York State.

Let me conclude with a few "lightening round" observations on other important parts of the bill. Again, I would refer you to our bill memorandum for greater detail regarding this testimony.

§3 of the bill contains a provision that would require every process server to complete an annual training course on the laws and regulations that govern the service of process. The NYSPPSA and NAPPS strongly support this new requirement. NYSPPSA presently offers a six-hour training course and 100 question test that process servers must take and pass to be designated a "Certified Process Server" by the association. We support requiring all persons seeking a process server's license to complete this level of rigorous training and testing before they receive a license. Continuing education requirements for experienced process servers should be mandated as well.

§3 of the bill also contains a provision that would require every process server and process serving agency to retain records of every process served for no less than seven years. We favor two changes to this provision. First, we would request that the law explicitly state that records can be kept in paper or electronic form. Second, we believe seven years is an overly burdensome amount of time for a business or individual to have to maintain records of every process it serves. Seven years is longer than most statute of limitations periods and far exceeds standard business record keeping requirements and practices, including the two-year record retention requirement for process servers under state law. We would be willing to support an

expanded three-year requirement that increase the state standard by 50% without placing an overly burdensome record keeping requirement on process servers and agencies.

Finally, we are concerned about the provision in §3 that states "In each and every suit, or prosecution arising out of this subchapter, it shall be presumed that an employee of the agency is acting in the course of his or her employment when serving process assigned or distributed by the applicant." The laws governing vicarious liability, and the burdens associated therewith, have been well developed by the courts over the course of centuries. It is neither necessary nor prudent for this bill to create a total presumption that an agency employee is acting in the course of his employment for violations of this chapter. Certain acts – such as those involving violence – are never authorized by process serving agencies, yet even in such an extreme case, this provision would place the often impossible burden on agencies of having to prove a negative, such as proving that they did not give permission for their server to use violence while serving process.

I would like to conclude by thanking the committee for its time and for this opportunity to testify today. I would also like to encourage the committee not to give in to the fervor presently surrounding this issue by rushing to pass an imprudent bill or one that that time, effort and deliberation could make significantly better. New Yorkers will not benefit from whatever symbolic help passing *any* law affecting process servers would offer. What they need, and what the process serving industry needs, is the real help that comes only from passing the *right* law in the *right* forum.

I would be happy to answer any questions the committee has at this time.

Bill Memorandum

Intro. 1037-2009

PREPARED BY THE PUBLIC ADVOCACY GROUP ON BEHALF OF
THE NEW YORK STATE PROFESSIONAL PROCESS SERVERS ASSOCIATION
AND THE NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS

(Updated: October 13, 2009)

Provision:

Section 1. Section 20-403 of the administrative code of the city of New York is amended to read as follows:

b. Process serving agency license. It shall be unlawful for any process serving agency to assign or distribute process to individual process servers for actual service without a license therefore.

Recommendation:

Amend the clause to read:

b. Process serving agency license. It shall be unlawful for any process serving agency **with offices located in the City of New York** to assign or distribute process to individual process servers for actual service without a license therefore. **It shall also be unlawful for any process serving agency to cause one of its employees to serve process within the City of New York unless the process serving agency has a license therefore.**

Commentary:

It greatly expands the typical scope of New York City laws to require agencies located outside of New York City and even New York State to obtain a New York City license (and, thereby, submit to the administrative jurisdiction of the New York City Department of Consumer Affairs) in order to hire a New York City business or individual to serve process in New York City. The reach of the law is the greatest concern when an agency has no other connection to New York City. It is adequate, for the purposes of protecting consumers, to ensure that a license is held by

all process serving agencies located in the City of New York as well as any and all businesses and individuals who actually serve process within the City of New York.

Process serving is commonly a national undertaking. For example, a process serving agency in Atlanta that needs to serve process in Manhattan would hire an Albany-based "clearinghouse" agency to handle the service of process within the State of New York. That clearinghouse would in turn hire a "downstate" Long Island agency to oversee the service of process in New York City. Finally, the Long Island agency would hire a New York City-based process server to actually serve process in Manhattan. Requiring the Atlanta, Albany and Long Island agencies to all hold a New York City license (and, from time to time, to physically appear before the Department of Consumer Affairs in New York City for filings, record keeping reviews, to challenge alleged violations and to meet other legal requirements) seems unnecessary, overly-burdensome and might not survive a court challenge.

Further, if all process serving agencies that assign service on a national level – which constitutes most agencies – are forced to pay $500 for licenses in New York City, other cites would likely follow suit with similar legislation (either because they think licensing is a good idea, to gain a new source of revenue primarily from out-of-state sources, or in retaliation against New York City). If enough localities adopted similar legislation, it would dramatically increase the cost of serving process for consumers and would drive enumerable agencies out of business. NAPPS has concluded that likelihood of copycat legislation emerging across the country is exceptionally high, as it is well-known that elected officials in other jurisdictions regularly monitor the New York City Council to come up with ideas for legislation they can sponsor in their own localities.

Presently several states, counties and one city other than New York require the licensing of process servers (see Appendix A). Not one of them, however, extends that requirement to companies and individuals who are not physically located in or directly serve process within their jurisdiction. New York City would be creating a dangerous precedent here that could not only harm the process serving industry but also one that could be extended to harm other regulated industries as well. Further, extending such licensing powers to encompass companies and individuals beyond the borders to New York City – which, consistent with the current law, the New York City Department of Consumer Affairs has not done – may violate New York City statutory authority under New York's and the United States' laws and constitutions.

Provision:

§2. Section 20-404 of the administrative code of the city of New York is amended to read as follows:

b. A process serving agency is any person, firm, partnership, association or corporation, other than an attorney or law firm located in this state, who maintains an office, bureau or agency the purpose of which is to assign or distribute process to individual process servers for actual service.

Recommendation:

No changes required if the aforementioned changes to §20-403(b) are made; otherwise:

b. A process serving agency is any person, firm, partnership, association or corporation, other than an attorney or law firm located in this state, who maintains an office, bureau or agency **in the City of New York,** the purpose of which is to assign or distribute process to individual process servers for actual service.

Commentary:

See commentary for recommended changes to §20-403(b)

Provision:

§3. Subchapter 23 of chapter 2 of title 20 of the administrative code of the city of New York is amended by adding new sections, 20-406.1. . . to read as follows:

20-406.1 Bond required. a. As a condition of the issuance of a process server license, each applicant for such license or a renewal thereof shall furnish to the commissioner a surety bond in the sum of ten thousand dollars, payable to the city of New York, executed by the applicant and a surety approved by the commissioner. Such bond shall be conditioned upon the applicant's compliance with the provisions of this subchapter and any rules promulgated thereunder, and upon the further condition that the applicant will pay to the city any fine, penalty or other obligation relating to a violation of this subchapter and any rules promulgated thereunder, within thirty days of its imposition, or any final judgment recovered by any person who was injured by the violation of any of the provisions of this subchapter and was damaged thereby. The commissioner may by rule authorize an individual applicant, in lieu of furnishing a bond, to satisfy the requirements of this section by depositing cash in an amount equal to the amount of the surety bond required by this section or by rule of the commissioner.

b. A process server licensed under this subchapter who engages in the business of serving process exclusively as an employee of a process serving agency licensed under this subchapter shall not be required to furnish a surety bond pursuant to subdivision a of this section.

c. As a condition of the issuance of a process server agency license, each applicant for such license or a renewal thereof shall furnish to the commissioner a surety bond in the sum of one hundred thousand dollars, payable to the city of New York, executed by the applicant and a surety approved by the commissioner. Such bond shall be conditioned upon the agency applicant's compliance with the provisions of this subchapter and any rules promulgated

thereunder, and upon the further condition that the applicant will pay to the city any fine, penalty or other obligation relating to a violation of this subchapter and any rules promulgated thereunder, within thirty days of its imposition, or any final judgment recovered by any person who was injured by the violation of any of the provisions of this subchapter or by the willful or negligent wrongful act of the principal, agent, or employee of such applicant. In each and every suit, or prosecution arising out of this subchapter, it shall be presumed that an employee of the agency is acting in the course of his or her employment when serving process assigned or distributed by the applicant. The commissioner may by rule authorize an applicant, in lieu of furnishing a bond, to satisfy the requirements of this section by depositing cash in an amount equal to the amount of the surety bond required by this section or by rule of the commissioner.

Recommendation:

Eliminate the entire section and replace it with language establishing stricter penalties for knowingly/intentionally submitting an improper affidavit of service to a court located within the City of New York.

Commentary:

The objective behind this clause is a good one: namely, to protect persons injured by bad-actor process servers and to deter improper service. Unfortunately, it is very likely to have the opposite effect.

Surety bonds, such as those required by this proposed new section, are relatively cheap: they cost about $80-$100 for a $10,000 bond. As such, for $80-$100 for independent process servers and $800-$1,000 for agencies, all bad-actors in the process serving industry will be permitted and required by law to purchase the equivalent of a "get out of jail free card" for civil lawsuits. The surety bonds will actually serve to indemnify bad-actors from civil damages when they engage in improper service. This eliminates an important disincentive to submit improper service and actually promotes bad behavior.

The goal of protecting the public and deterring bad-actors who might otherwise engage in improper service is better served by increasing the penalties applicable to those who knowingly engaging in improper service. Presently, the New York State Attorney General may seek, and New York City-based courts can assess, only a $1,000 civil fine for such violations – an amount which is clearly inadequate (see Appendix B). Although those who engage in improper service may also face criminal penalties for perjury and filing a false affidavit with a court as well as civil action against them by the aggrieved party, the New York State Professional Process Servers Association ("NYSPPSA") and the National Association of Professional Process Servers ("NAPPS") concur with the sponsors of this bill that the level of deterrence should be increased. NYSPPSA and NAPPS fully support increasing the potential consequences (i.e. jail time, penalties, license forfeiture) for those who intentionally violate process serving law. Of course, these new penalties should only apply to those who knowingly/intentionally engage in improper service – as state law recognizes, it does not serve the public interest to severely punish those who make innocent mistakes (see Appendix B). As for process servers who negligently engage

in improper service, an increasing system of fines could be established in this legislation which recognizes that while mistakes happen, repeated sloppiness will not be tolerated.

Should the City Council's attorneys conclude that the City of New York does not have the legal authority to increase penalties against those who knowingly engage in improper service, NYSPPSA and NAPPS would encourage the New York City Council to instead adopt a resolution calling on the New York State Legislature to license all process servers and process serving agencies located in the State of New York and to significantly increase penalties against those individuals and agencies who knowingly engage in improper service. While a resolution would not create the immediate deterrent we are all seeking, it is far better to attempt to secure an effective law from the state legislature than to have the City Council pass a law that provides no deterrent, and inadequate deterrent or, worst of all, an incentive to bad behavior.

The education and training requirements found elsewhere is this legislation will provide excellent opportunities to make process servers fully aware of the serious penalties they will face for knowingly/intentionally engaging in improper service, whether they are adopted by the City Council or State Legislature. These requirements will help to create the deterrent this bill is seeking to establish.

Separately, it bears noting that if other New York State municipalities were to follow suit with similar surety bond requirements, the cumulative economic costs could become too great for professional process servers and their clients to bear. In that case, litigants might resort to hiring non-professionals (i.e. couriers, students) to serve process who will do it less than five times a year, and therefore escape the law's regulations. Because these persons will not know the rules for proper service, the risk of improper service would rise considerably.

Finally, we are concerned about the provision that states "In each and every suit, or prosecution arising out of this subchapter, it shall be presumed that an employee of the agency is acting in the course of his or her employment when serving process assigned or distributed by the applicant." The laws governing vicarious liability, and the burdens associated therewith, have been well developed by the courts over the course of many years. It is neither necessary nor prudent for this bill to create a total presumption that an agency employee is acting in the course of his employment for violations of this chapter. Certain acts – such as those involving violence – are never authorized by process serving agencies, yet even in such extreme cases this provision would place the very difficult burden on agencies of proving a negative; namely, in this example, that they did not give permission for their server to use violence while serving process.

Provision:

§20-406.2 Responsibilities of process serving agencies. Every process serving agency licensed under this subchapter shall:

b. Provide to each process server employed by such agency a written statement indicating the rights of such employee and the obligations of the process serving agency under city, state and federal law. Such statement of rights and obligations shall include, but not be limited to, a general description of employee rights and employer obligations pursuant to laws regarding minimum wage, overtime and hours of work, record keeping, social security payments, unemployment insurance coverage, disability insurance coverage and workers' compensation. Such statement of rights and obligations shall be prepared and distributed by the commissioner to licensed process serving agencies;

c. Keep on file in its principal place of business for a period of three (3) years a statement for each employee, signed by such employee, indicating that the employee has read and understands the statement of rights and obligations he or she received pursuant to subdivision (b) of this section;

d. Provide annual training for every process server under its employ regarding compliance with all laws and regulations pertaining to the proper service of process, including, but not limited to, the preparation, notarization and filing of affidavits of service of process and other documents and the maintenance of records.

Recommendation:

None (but see commentary below)

Commentary:

NYSPPSA and NAPPS strongly support these new requirements. NYSPPSA presently offers six-hour training course and 100 question test persons must take to be designated a "Certified Process Server" by NYSPPSA. We would encourage that either specific language in the law itself, or in the Department of Consumer Affairs' regulations, require all persons seeking a process server's license to complete this level of rigorous training and testing before they receive a license for the first time. Continuing education requirements for experienced process servers should be mandated as well.

Provision:

§20-406.3 Records. a. Every process server and process serving agency licensed under this subchapter shall retain records for no less than seven (7) years of each process served.

b. A process server licensed under this subchapter who engages in the business of serving process exclusively as an employee of a process serving agency licensed under this subchapter shall not be required to retain records for no less than seven years pursuant to subdivision a of this section, but shall be required to comply with all applicable state laws pertaining to record keeping.

Recommendation:

Amend the clause to read:

a. Every process server and process serving agency licensed under this subchapter shall retain records**, in paper or electronic form,** for no less than **three** years of each process served.

b. A process server licensed under this subchapter who engages in the business of serving process exclusively as an employee of a process serving agency licensed under this subchapter shall not be required to retain records for no less than **three** years pursuant to subdivision a of this section, but shall be required to comply with all applicable state laws pertaining to record keeping.

Commentary:

While NYSPPSA and NAPPS support this bill's record keeping requirements, it believes a seven year requirement is a bit excessive and places a very heavy burden on process servers and agencies. Seven years is longer than most statute of limitations periods and far exceeds standard business record keeping requirements and practices, including the two year record retention requirement for process servers under state law (see NY CLS Gen Bus § 89-u(6)). A three year requirement will protect consumers (increasing the state requirement by 50%) without placing an overly burdensome record keeping requirement on process servers and agencies. Although the idea was raised of requiring records to be maintained for the same period of time as the statute of limitations for the claim(s) being served, such a requirement would be impossible to administer, as it would require the process serving agency or individual, for every process they served, to determine the date on which each and every cause of action(s) arose and to determine the applicable statute of limitations period. This would obligate the process server/agency to read the complaint for every case for which they serve process and, in cases of latency, to make a legal determination as to when the cause of action arose. This is impracticable.

It would also be helpful, for purposes of clarity and to make the organization and maintenance of records easier, to explicitly provide the option to have records maintained in electronic form.

Provision:

§20-406.4 Handbook. The commissioner shall develop a handbook to be distributed to all process servers and process serving agencies licensed under this subchapter. Such handbook shall contain, at a minimum, a statement of all laws and regulations pertaining to service of process in New York City.

Recommendation:

None

Commentary:

NYSPPSA and NAPPS strongly support this new requirement.

APPENDIX A

Currently Existing Process Server Licensing Laws in the United States

STATEWIDE LICENSING LAWS

ALASKA

Process servers are licensed by the Commissioner of Public Safety. Applicants must pass a written examination. [Alaska Administrative Code, Title 13, section 067.5 thru 067.100]

ARIZONA

Arizona has statewide registration of process servers in compliance with procedures set forth by the Arizona Supreme Court. Applicants must be 21 and a bona fide resident for one year immediately preceding application. Applicants must pass a written examination. [Arizona Rules of Civil Procedure, Rule 4(e)]

CALIFORNIA

Persons who serve more than 10 papers a year are required to be registered in the county in which they operate. Registration is valid statewide. Applicants must be a resident for one year immediately preceding filing. No testing or education required. Licensed private investigators, although exempt from the registration requirement, would probably not be empowered to serve bank levies and similar documents without being registered in view of the statutory language requiring that a *registered process server* serve those documents. [California Business and Professions Code §22350 and §22353]

ILLINOIS

There is no statewide licensing law in Illinois; however, a person licensed in Illinois as a "private detective" may serve original process in all counties except for Cook County without special appointment. In order for private investigators to serve in Cook County, the court upon motion and in its discretion may appoint a "private detective agency" as a special process server in lieu of an individual. It is not necessary that service be made only by a sheriff or private investigator. Private persons over the age of 18, upon motion, may be appointed by the court to serve original process. [Illinois Compiled Statutes §5/2-202]

MONTANA

Any person who makes more than 10 services of process in any single calendar year must be registered. The registration certificate also empowers the process server to act as a levying

officer. Applicants must pass a written examination based on the Handbook for Process Servers, which is published by the Montana Department of Commerce. [Montana Code Annotated §25-1-1101 and §25-1-1111]

NEVADA

All persons who engage in business as a process server must be licensed. Applicants must be 21 years of age and have two years experience as a process server. Applicants must deposit $750 at time of application to pay for a background investigation, the cost of which must be paid for by applicant up to a maximum of $1,500. Applicants must pass a written application and may be required to pass an oral examination. Licenses are issued by the Nevada Private Investigator's Licensing Board. Nevada is the most expensive state in the nation in which to get licensed. [Nevada Revised Statutes §648.110 and §648.135]

OKLAHOMA

Process servers are required to be licensed. Applicants may pay a fee of $35 and be licensed to serve process in the county in which the license is issued, or applicant may pay a fee of $150 and be licensed statewide. The license states that process servers are officers of the court only for the service of process. No testing or education required. [Oklahoma Statutes Annotated §12-158.1]

TEXAS

Effective July 1, 2005, the Texas Supreme Court adopted changes to Rules 103 and 536(a) of the Texas Rules of Civil Procedure (TRCP) which pertain to the statewide Certification of process servers. The Texas Supreme Court's website at www.courts.state.tx.us/psrb/psrbhome.asp provides a full explanation of the new rules and the procedure for becoming certified in all Texas courts.

WASHINGTON

A person who serves legal process for a fee in the State of Washington is required to register with the auditor of the county in which the process server resides or operates his or her principal place of business and pay a $10 fee. No testing requirement. Washington is the easiest and most inexpensive state in which to get a license. [Revised Code of Washington §18.180.010]

LOCAL LICENSING LAWS

FLORIDA (several counties)

Sheriffs in certain counties (currently about seven) will appoint individuals as a special process server. Applicants must be at least 18 year old, be a permanent resident of the state and submit to an examination. [Florida Statutes § 48.021]

The chief judge of each judicial circuit is empowered to certify process servers to serve process, and currently judges in approximately 30 counties grant such certifications. The requirements for becoming certified are essentially the same as the requirements for being appointed a special process server by the sheriff. [Florida Statutes § 48.27 – 48.29]

MISSOURI (City of St. Louis)

The City of St. Louis (pop. 400,000) requires that all persons who want to become process servers must take and pass a training course (five nights of classroom instruction with written examination) administered by the Sheriff of the City of St. Louis. Applicants must be 21 years of age, have a high school diploma or GED and no criminal record.

NEW YORK (City of New York)

The City of New York requires all persons who serve process within its five boroughs to be licensed through the City's Department of Consumer Affairs. [Rules of the City of New York, subchapter W, §2.231, et seq. and §20-403, et seq.]

APPENDIX B

State Law Governing Fines For Knowingly Engaging in Improper Service In New York City

NEW YORK STATE GENERAL BUSINESS LAW, ARTICLE 8-A: PROCESS SERVERS AND PROCESS SERVING AGENCIES IN CITIES HAVING A POPULATION OF ONE MILLION OR MORE

§ 89-hh. Enforcement by attorney general. In addition to the other remedies provided, whenever there shall be a violation of this article, application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction by a special proceeding to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violations; and if it shall appear to the satisfaction of the court or justice that the defendant has, in fact, violated this article, an injunction may be issued by such court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules. Whenever the court shall determine that a violation of this article has occurred, the court may impose a civil penalty of not more than one thousand dollars for each violation. Provided, however, a process server or agency may not be held liable for penalty in any action brought under this section for violation of this article, if the process server or agency shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical calculation, computer malfunction and programming and printing errors. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

CAMBA
Legal Services

TESTIMONY IN SUPPORT

November 13, 2009

BILL NUMBER: Int 1037-2009

SPONSORS: Daniel R. Garodnick, Jessica S. Lappin, Gale A. Brewer, Letitia James, John C. Liu, Alan J. Gerson, Michael C. Nelson

TITLE OF BILL: A Local Law to amend the Administrative Code of the City of New York, in relation to process servers.

PURPOSE: The bill would amend New York City Administrative Code to strengthen the licensing requirements for process servers and process server agencies.

STATEMENT OF SUPPORT:

I would like to begin by thanking the City Council for the opportunity to speak here today. My name is Matt Schedler, I am an attorney practicing consumer law at CAMBA Legal Services, a community based non-profit legal service provider located in the Flatbush neighborhood of Brooklyn. CAMBA's consumer law program arose out of its membership in the working poor coalition, a five member group which includes the Urban Justice Center, Westside SRO, Housing Conservation Coordinators, and Northern Manhattan Improvement Corp. The consumer program works to assist housing clients at the member organizations with consumer issues, providing a holistic approach aimed at helping clients achieve self sufficiency.

The problems with improper service, and the resulting high rate of default judgments, are well documented. In its 2006 report, Debt Weight: The Consumer Credit Crisis In New York City and Its Impact on the Working Poor, the Urban Justice Center found that default judgments were granted in 80.0% of cases and that most of these default were the result of improper service. Urban Justice Center, *Debt Weight: the Consumer Credit Crisis in New York City and its Effect on the Working Poor* (October 2007). A 2008 study by MFY, specifically examining the issue of improper service, had similarly troubling findings. Chief among these were low rates of personal service –the method of service most easily verified because the affidavit of service contains a description of the defendant - and the rare instances of challenges to service through traverse hearings. MFY Legal Services, *Justice Disserved* (June 2008) (available at http://www.mfy.org/Justice_Disserved.pdf).

I personally see the negative effects of improper service, and the accompanying default judgments, on a daily basis. The case of Miriam, a former CAMBA client, presents a typical fact pattern. Miriam was sued for a credit card she never had by a debt buyer she had never heard of. Service of process was attempted at a former address where Miriam had not lived in 2 years. When the process server arrived at this address, Miriam's former landlord informed him that she did not live there anymore. In spite of this, an affidavit of service was filed stating that substitute service had been properly performed at the former address, and that the process server confirmed that Miriam lived there. Because Miriam never knew about the action against her, she never responded to the summons and complaint and a default judgment was entered. Miriam found out about the judgment when a bank account containing her developmentally disabled child's Social Security benefits was frozen. When this happened, Miriam called the law firm to find out why her account was restrained. The law firm gave her no information except that she had to pay $400 if she wanted the restraint lifted. Needing the access to her account to provide for her child, Miriam agreed to pay the $400. Luckily, Miriam eventually found representation and was able to have this situation remedied, but Miriam's fact pattern is common and legal services resources are limited.

The amendments proposed by the City Council would do much to remedy the problems of improper service and lower the Civil Court's high default rate. The bonding requirements will ensure that fines and judgment against process servers are enforceable, and will eliminate fly by night process servers seeking to make a "quick buck." The new responsibilities imposed on process serving agencies will help process servers understand the regulations governing them, and increase agency accountability. The requirement lengthening the retention period for logbooks will assist greatly in conducting traverse hearings. Speaking from personal experience, having a traverse hearing where no there is no logbook is required is extraordinarily difficult, and verification of the service turns into guesswork.

While the amendments proposed here today would be a marked improvement in the law governing process servers, more can be done. The systemic failure to effectuate service is not simply the result of a few rogue process servers who can be eventually fettered out. The epidemic of failed service stems from the large incentives to creditor plaintiffs if they fail to inform defendants that they are being sued. If service is not properly performed the defendant never appears in court, and the plaintiff is awarded an automatic victory. This victory comes without having to present any evidence of their claim – evidence, because of the realities of the consumer credit industry, plaintiffs often do not have. Armed with a judgment, a creditor now has a powerful enforcement tool and is free to restrain a bank account or garnish wages. Magnifying this powerful incentive is the lack of negative consequences for creditors that fail to serve defendants. While dismissal for improper service is available, unrepresented litigants face enormous obstacles to obtaining a dismissal, and, as the MFY report shows, this rarely happens. In order to attempt challenge service the defense must be raised in the answer, even if this is done, a defendant must then move to dismiss for lack of service within 60 days of asserting it. This requirement is unknown to unrepresented litigants, and, in many cases,

the court date scheduled for the defendant upon filing the answer is after the 60 day time limit to move to dismiss has expired. To effectively remedy sewer service a disincentive for improper service must exist. The creation of a private right of action for defendants who have suffered sewer service would provide this disincentive. This right of action could be modeled on New York Administrative Code Section 20-743.1, which creates a right of action for consumers who are harmed by tax preparers. Any right of action should provide for meaningful statutory damages and attorneys' fees to ensure that consumer's claims are pursued. This right would also make the bonding requirement more significant, as consumers would have a consequential mechanism to make claims against the bond. To permanently remedy the epidemic of improper service it is necessary to change the calculus that rewards failed service and easy default judgments. For this reason, I would strongly urge the City Council to consider adding a private right of action to the amendments being considered.

In closing I would again like to again thank the New York City Council for the opportunity to speak hear today and offer my support to the amendments under consideration.

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Testimony of The Legal Aid Society

Proposed Amendments to New York City Administrative Code

Regarding Process Server Licensing

New York City Council

Committee on Consumer Affairs

Hon. Leroy Comrie, Chair

Testimony of The Legal Aid Society Before The New York City Council on Consumer Affairs Regarding Int. 1037-2009.

Presented by Tashi T. Lhewa, Staff Attorney

November 13, 2009

We at The Legal Aid Society want to thank you Chairperson Comrie and members of the Consumer Affairs committee for the opportunity to comment on the proposed amendments regarding licensing and regulation of process servers and for the ongoing attention on the issue as it relates to consumer rights. I would also like to thank Council member Garodnick for his leadership on this important issue. We believe that the proposed amendments will provide much needed and long overdue consumer protections and oversight that current laws do not fully address.

The Legal Aid Society

The Legal Aid Society is the oldest and largest legal services provider for low income families and individuals in the United States, annually, the Society handles some 300,000 cases and legal matters for low income New Yorkers with civil, criminal and juvenile rights problems, including more than 30,000 civil matters and law reform cases which benefit some 2 million low income families and individuals.

Through a network of ten neighborhood and courthouse-based offices in all five boroughs and 23 city-wide and special projects, the civil practice provides direct legal representation to low income individuals. In addition to individual representation, The Legal Aid Society engages

in law reform litigation, advocacy and neighborhood initiatives, and provides extensive back up support and technical assistance for community organizations.

The Society's consumer law practice regularly represents and assists low income consumers who are the victim of unscrupulous process servers and process server agencies. These consumers, due to 'sewer service,' find out about lawsuits and court judgments against them for the first time, when their bank accounts are frozen, wages garnished, assets seized and numerous other consequential damages have occurred. Our support for the proposed amendments to New York City Administrative Code is based upon The Legal Aid Society's extensive work with individual clients, communities, and organizations who have worked with consumers on issues relating to service. It is our belief that the proposed amendments can substantially reduce the epidemic of default judgments that are obtained on the basis of intentionally improper service of process and fraudulent affidavits of service.[1]

The vast majority of clients that I have represented in consumer debt collection cases have been the victims of improper practices by process servers and agencies. In almost all of those cases we were able to overturn default judgments, remove holds on of bank accounts and provide relief from garnishment of wages. Yet, because of limited resources, The Legal Aid Society and other organizations that work with consumers are able to assist only a relatively small number of individuals who become the victims of unethical behavior by process servers and their debt buyer employers. In New York only approximately four percent of consumers in debt collection cases are represented by counsel in debt collection cases.[2]

Growth in Improper Process Server Practices

[1] NY CPLR § 308

[2] Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor, Oct. 2007, Urban Justice Center, available at http://www.urbanjustice.org/ujc/publications/community.html?year=2007.

The number of consumer debt cases filed in New York City Civil Court has exploded in recent years. In 2006 alone, approximately 320,000 such cases were filed in the five boroughs.[3] Almost $ 1 billion in claims were made against New York City residents in consumer debt filings.[4] Well over 80 percent of debt collection cases result in default judgment, which are routinely granted when consumers fail to appear in court after process servers claim to have served them.[5] Based on our experience, we firmly believe that the exponential number of default judgments obtained is by reliance on 'sewer service'. Process servers regularly fail to properly serve individuals and submit incorrect and blatantly false affidavits of service against them and the lawsuits conclude in default judgments. Debt buyers and other entities that retain process servers and agencies regularly rely on the consumers to not appear in court to win their cases. As a result, incentives exist for process servers to provide 'sewer service', whereby consumers are not given notice of lawsuits and which are concluded with default judgments. These incentives exist because the process servers are involved in volume practice, whereby the average payment for performing service of process in debt collection cases is in the range of $ 25-50 per service.

Current rules pertaining to the licensing and regulation of process servers include the General Business Law[6] on the State level and the Administrative Code of the City of New York on the city level.[7] These regulations in themselves lack the deterrent effect and enforcement mechanism required to halt the exponential growth in consumer right violations by unethical process servers. By including the requirement of a surety bond and recording requirements in the proposed amendments, mechanisms to protect consumers rights will be strengthened.

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[3] Id.
[4] Id.
[5] Id.
[6] New York Gen. Bus. L §§ 11, 13, 89.
[7] NY Admin. Code § 20-403-409; Gen. Bu

Client Story

Mr. H's story illustrates the challenges and difficulties an individual consumer faces with negligent process servers and the need for the proposed amendments. Mr. H, a client of The Legal Aid Society and a low income immigrant from Haiti, first discovered that a debt collection default judgment had been issued against him when he found out that his bank account had been frozen. In this instance, a process server had failed to use 'due diligence' in attempting to locate Mr. H. The process server's lack of diligence compounds the problem of debt buyers not having accurate or updated addresses for consumers. After failing to inquire with neighbors or anybody else as to Mr. H's location, the process server proceeded to leave a copy of the summons and complaint at Mr. H's former residence.[8] As a result of the process server's failure to follow the legal requirements for service of process, there were severe consequences for Mr. H.

Mr. H's bank account was suddenly frozen and numerous bills and payments of his were returned back as unpaid, with an average $ 35 fee per unpaid bill. Mr. H, as a result, had his life insurance policy, car insurance and IRA account terminated when payments were not made. It took him many months and his agreement to make a higher monthly payment charge to obtain auto insurance again. Exactly two weeks after he discovered the news about his frozen bank account, his wages started to be garnished as well. Mr. H a Patient Care Worker at a city hospital, is a hard working, low wage worker, with four children whom he supports. There are numerous low income consumers in Mr. H's circumstances who have fallen victim to process servers who regularly partake in sewer service to minimize their own costs. The proposed amendments would effectively reduce the numbers of cases like Mr. H, by acting as a deterrent to process severs who take part in abusive practices and encourage others to provide proper service of process.

[8] NY CPLR § 308(4)

Systemic Problems Associated with Process Servers

The improper practices by process servers are not restricted to a few individuals or any single entity. The practices are systemic and troubling pattern have emerged in the last several years. The recent lawsuit filed by the Attorney General Andrew Cuomo against American Legal Process, one of the largest process server companies in the United States, illustrates the nature and extent of the problem.[9] The process server defendant had a regular practice of intentionally providing fraudulent affidavits of service and providing incorrect service of process. The Attorney General is currently seeking to overturn more than 100,000 default judgments in that case. In New York the failure to follow proper procedures in providing service of process has become a common occurrence; therefore the proposed amendments are urgently needed.

Another reason that the proposed amendments are needed is the inability of the court system to address the growing epidemic of sewer service and fraudulent affidavits of service because of resources. As a common occurrence in the courts, default judgments are regularly obtained on the basis of fraudulent affidavits of service. The inability of other institutions to provide protection to consumers regarding issues of service, further illustrate the necessity of consumer protections provided by the amendments to the city administrative code.

Suggested Friendly Amendments to Intro 1037-2009

We support the requirement of a surety bond for process servers in Section 20-406.1(a-c) as a deterrent against abusive practices by process servers and agencies. They will be less tolerant of negligent and fraudulent behavior in themselves and their employees when the surety bond can be utilized by private consumers and the Department of Consumer Affairs in collecting

[9] Pfau v. Forster & Garbus, Index. No. I 2009-8236 (Sup Ct Erie Co.).

fines and judgments. Furthermore, such a bond requirement, by placing a financial obligation, would 'weed out' process servers who are in the profession for the short term, thus less knowledgeable about the field and more prone to abusive practices. Though the surety bond requirement will assist consumer who are victimized, we believe that two additional changes are needed regarding the surety bond for not-for-profit organizations and a private right of action.

First, Section 20-406.1(b) should be modified to state, "A process server licensed under this subchapter who engages in the business of serving process exclusively as an employee of a process serving company licensed under this subchapter or exclusively for a not-for-profit organization shall not be required to furnish a surety bond pursuant to subdivision (a) of this section." The abusive process serving practices have existed and grown primarily in the debt collection practice area and exclusively with private process servers and process serving agencies. However, such a requirement unnecessarily burdens not-for-profit institutions such as Legal Aid. This would have an adverse effect on consumer protections by placing additional financial burdens on those who represent the victims of abusive behavior by process services.

Second, there should be a private right of action included for individual consumers to pursue when they are the victims of abusive behavior by process servers. At past consumer affair committee meetings The Legal Aid Society has raised concerns about the Department of Consumer Affairs' failure to enforce provisions of the City Administrative Code and State Laws, when it comes to abusive behavior by process severs and debt buyers because of limited resources. We believe that the only way to provide for strict compliance with the proposed amendments and other process server regulations is to give consumers a private right of action , similar to that of Section 20-743.1, dealing of tax preparers and Section 20-401, dealing with improvement contractors.

We support the requirements of Section 20-406.2(b) that process serving companies provide their employees with a written statement of their employee rights, Section 20-406.2(d) that they provide them with annual training, and Section 20-406.4, and that they develop and distribute a handbook of relevant laws and regulations to all licensed process servers and process serving agencies. Information provided to employees of process serving agencies relating to their minimum wage, hours or work, compensation, and other benefit allows process servers to be more aware of their rights, and thus less likely to be pressured into abusive practices by their employing agencies. The requirement on process serving agencies in Section 20-406.2(d) to provide annual training is crucial. Process serving as a profession is a field that does not have any pre-requisite training requirement nor education on ethical obligations. Therefore, having the requirement of training on an annual basis as to the rights of consumers, permissible methods of service and ethical obligations, will greatly assist in preventing abusive practices by process servers. Similarly, Section 20-406.4 is necessary to provide information and educate process servers regarding their legal and ethical obligations when they are performing service of process.

We are in support of Section 20-406.3, which requires process servers and agencies to maintain records for no less than seven years on each process served. Such a requirement provides for more fairness and accuracy in process serving. Consumers are thereby provided additional protection when they appear in court contesting service of process. This is especially the case when default judgments occur, as consumers commonly discover and raise the issue of improper service in the courts many years subsequent to the alleged service.

Though we believe the amendment's requirement of surety bonds, record keeping and other protections would decrease the systemic problem of sewer service and fraudulent practices by process servers, we believe that a change should be made to Section 1(a) of the proposed

amendment. The language of Section 1(a) should be modified to state, "It shall be unlawful for any person to do business as a process server, without a license therefor." Having the language refer to "doing business," would prevent any potential irregularities in interpretation, which could deny individuals their right to service of process on four occasions in any one year, without being required to obtain a license or meet other requirement of the amendments, pursuant to Section 2(c). Many civil litigants lack the resources to obtain counsel in routine landlord and tenant and civil cases. If they have to serve process, they need to rely on their friends and relatives for one-time service of papers because they cannot incur the process serving fees. These are not people the people committing the abuses and the proposed amendments should not mistakenly target them too.

Conclusion

As you have heard from other witnesses today, the proposed amendment includes long needed regulations and enforcement mechanisms, but we believe that having the tools alone is not are not sufficient. Additional steps can also be taken to follow up and ensure that the provisions of amendments are actually being enforced by the DCA. The Legal Aid Society believes that the amendments to NY Admin. Code 20-433-406 are currently needed and support its passage. We recommend changes to the proposed amendments in the form of a private right of action for consumers and an exemption from the surety bond requirement for not-for-profit organizations. We further support vigorous enforcement of the new regulations by the DCA. We believe implementation and enforcement of the proposed amendments will go a long way to protect the rights of consumers. Thank you again for your leadership on these issues.

Respectfully submitted,

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November 13, 2009

The Committee on Consumer Affairs
The Committee Room,
City Hall, New York, NY

Re: Int. No. 1037 - A Local Law to amend the administrative code of the city of New York, in relation to process servers

Dear Committee Members,

South Brooklyn Legal Services is a not-for-profit law office that provides free civil legal services to low-income people in Brooklyn. Each year, SBLS's 50 attorneys and paralegals represent over 5,000 clients in a wide range of issues, including consumer law.

In the past six years, SBLS has heard hundreds of complaints from clients about sewer service. Such was the case of Wilhelmina V, a widow living on $500 a month in Social Security. She learned that she was sued only after her bank account was frozen by a debt buyer who had obtained a default judgment against her. The debt buyer was collecting on a debt that Ms. V had already paid. Its process server fraudulently claimed to have delivered the summons to a 14 to 20 year old young man named David V who answered Ms. V's door. Ms. V lived alone and had no son or grandson or any relative who fit that description. Only when Ms. V obtained legal representation did the debt buyer agree to vacate the judgment for improper service. As is usually the case, no enforcement action was taken against the process server for his false affidavit (doing so would have taken a great deal of time for not huge damages.)

Which is exactly why the proposed amendment is inadequate. It seeks to deter sewer service by creating yet another sanction - the prospect of the losing one's bond- that is triggered after the DCA establishes fraud through a time consuming investigation. Yet civil and criminal enforcement does little to deter sewer service because it is "so difficult to detect."[1] In the early

[1] The New York State Attorney General, the New York City Department of Consumer affairs, The New York City Department of Investigation, *A Joint Investigative Report*

1970's, Chief Administrative Judge Thompson of the Civil Courts of the City of New York vacated hundreds of judgments in masse that were obtained by sewer service.[2] Yet in 1985, sewer service remained "rampant" triggering criminal indictments of five process servers.[3] The DCA's laudable "operation double fault" in 1986 also failed to deter sewer service. In that operation, an undercover detective worked as a process server for various process service companies. He performed all service "by the book " (in accordance with the CPLR) and earned less than half the minimum wage, proving the low pay fostered sewer service.

Despite these efforts, sewer service is worse than ever before. In 1986, 48,000 default judgments due to sewer service were entered annually in New York City.[4] In 2007, about 80% of the 300,000 consumer suits filed in New York City ended in default judgments largely due to sewer service.[5] In 2009, the Attorney General sued to vacate over 100,000 default judgments involving sewer service by a single process serving company.[6]

For this reason, the DCA must set aside its bonding idea and instead amend §2-233 of the New York City Regulations to require each process server to maintain, as part of his or her service records, proof via a global positioning device that the process server visited the dwelling of the defendant at the times and dates purported in the affidavit of service. Such technology is cheap and readily available for both the independent process server or one who works with a process serving company as an employee. All of these technologies enable a process server to print out (and save electronically as well as a hard copy) a map that shows all of the process server's movements during the course of a business day. Most use cells phones for tracking. [7]

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into the Practice of Sewer Service in New York City, p. 2. (April 1986)

[2] In 1973, the New York State legislature codified Judge Thompson's practice by enacting CPLR 5015(c) ("Thompson's law"), which provides a mechanism for mass vacatur of default judgments procured by sewer service or other fraudulent practices. David D. Siegel, Practice Commentaries, CPLR 5015 (McKinney's 2007).

[3] *Supra* Note 1, pg. 2.

[4] *Supra* Note 1, pg. 3.

[5] The Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor* (2007)

[6] New York State Attorney General Press Release, *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) http://www.oag.state.ny.us/media_center/2009/july/july23a_09.html

[7] Verizon maps cell phone movements for $9.95 a month. http://products.vzw.com/index.aspx?id=fnd_familylocator Loopt documents the movement of a

For those who do not like cell phones, there are small transmitters (starting at $175) that one can place in the car or carry in one's pocket that will create the same image at the end of the work day.[8] The DCA alternatively could require the process server to photograph the defendant's dwelling with a computer chip (installed in the camera or cell phone) that GEO stamps the photo with the time, date and location of the camera. Those devises costs from $5 to $150.[9]

Some may say this proposal is an invasion of privacy. But the DCA is not interested in the process server's movements between service attempts. The process server can turn off the monitor whenever he or she wants to, provided it's on when service is attempted. Others may say that using GPS devices is gimmickry. However, advances in technology are adopted in legal proceedings when they advance justice, such as DNA testing to supplant oral testimony for establishing paternity,[10] or electronic service of information subpoenas on banks to locate a debtor's property.[11]

GPS technology, in fact, is already being used by an agency in New York City. In 2008, a building inspector faked a report stating he had inspected a crane on the upper east side. Eleven days later the crane collapsed, killing 7 people. In 2009, the Buildings Commissioner imbedded GPS mapping devices on all of his 379 inspectors' cell phones stating the tracking system was "a simple, innovative way to ensure inspectors reach their assigned locations and are held accountable for their important work."

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cell phone in the course of a day. http://en.wikipedia.org/wiki/Loopt Google Latitude is free enables an employer to see an employee's location via his cell phone. http://www.google.com/latitude/intro.html Mobile Spy maps a cell phone's movements for about $200 a year. http://www.mobile-spy.com/howitworks.html

[8] http://www.rmtracking.com/.

[9] Eye-Fi: Works on over 1,000 models of cameras; Starting at $59.99 http://www.eye.fi/how-it-works/features/geotagging GeoLogTag for iphone acts as a GPS data logger on photos taken with any digital camera for $4.99. http://www.apptism.com/apps/geologtag GPS Image tracker (GPS-CS3KA) is a chip one installs on a digital camera to record time, date and location to each photo for $149.99. http://www.sonystyle.com/webapp/wcs/stores/servlet/ProductDisplay?storeId=10151&catalogId=10551&langId=-1&productId=8198552921665751075

[10] *Jeter v. Clark*, 486 U.S. 456 (1988) (striking down a six year statute of limitations to bring paternity action since "increasingly sophisticated scientific tests facilitate the establishing of paternity regardless of the child's age")

[11]A N.Y. C.P.L.R. Sect. 5224(a)(4)

The work of process servers is equally important. A complaint, if unanswered, enables a creditor to freeze bank accounts, garnish wages, seize a car, and levy on personal property. If §2-233 is amended to require GPS-like proof of service, detecting sewer service will be so easy it will end. Process servers will also benefit as their wages will increase. And vulnerable New Yorkers with valid defenses, such as Ms. Wilhelmina V, will no longer miss their day in court.

Sincerely,

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Legal Support Unit

Legal Services NYC

TESTIMONY BEFORE THE NEW YORK CITY COUNCIL COMMITTEE ON CONSUMER AFFAIRS ON INT. NO. 1037—A LOCAL LAW TO AMEND THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK IN RELATION TO PROCESS SERVERS

NOVEMBER 13, 2009

This testimony is submitted on behalf of Legal Services NYC. Legal Services NYC is the nation's largest provider of free legal services to the poor. For nearly 40 years, Legal Services NYC has provided critical legal help to low-income residents of New York City. The nineteen neighborhood offices of Legal Services NYC operate in diverse communities throughout the city, representing thousands of low-income consumers and tenants annually in disputes involving their rights to remain in their homes and protect their income.

Manhattan Legal Services ("MLS") is a legal services provider with deep roots in the culturally diverse and low-income communities that encompass the Borough of Manhattan. MLS provides critical legal services to individuals on a wide range of matters in our two neighborhood offices located in Harlem and lower Manhattan. The Consumer Unit at MLS provides advice and direct representation to low-income Manhattan residents, prioritizing the elderly and disabled. In addition, our staff attorneys engage in community education projects to educate and inform New York City consumers of their legal rights.

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LSC

Queens Legal Services provides free civil legal services, including advice and representation, to low income residents of Queens County. Our practice includes a range of areas including consumer law, landlord and tenant law, and foreclosure prevention and defense work.

Legal Services NYC advocates have witnessed the prevalence of improper service of process and the devastating effects it has on the lives and health of the communities we represent. We commend the City Council for recognizing the problem that abuse of the service of process poses for low-income tenants and consumers who are left with default judgments. We strongly urge passage of Int. No. 1037, which would improve the regulation of process servers by requiring the posting of a surety bond, enhanced training, and greater record-keeping. These changes would help to ensure accountability for illegal practices and hopefully prevent many of these practices from occurring.

The Problems Posed by Sewer Service

Fraudulent service of process by licensed process servers, commonly known as "sewer service," undermines the judicial system by denying a defendant of their constitutional right to due process. The Court of Appeals has recognized that questionable service practices have the most impact on the poor and those least capable of obtaining relief from the resulting default judgment.[1]

Legal Services NYC attorneys representing consumers, as well as those representing tenants facing eviction, regularly see licensed process servers that consistently engage in questionable practices. In the less egregious cases, these process servers have not kept the proper records of service or simply failed to serve process in accordance with the requirements of law. However, in a large number of these cases, the process servers have actually submitted false affidavits of proper service. Some examples of false statements include: service upon a family member or friend who does not exist; service at an nonexistent address, or personal service on the defendant at an address where they do not live.

In our opinion, that process serving companies are often the cause of the sewer service. Many process serving companies only pay the process server a few dollars for each person served and only if

[1] Barr v. Department of Consumer Affairs of City of New York, 70 N.Y.2d 821 (1987).

they attest to effectuating service. Consequently, it is in the process server's financial interest to produce an affidavit of proper service regardless of whether service was made. In addition, many process serving companies do not provide the process servers with proper education of what the law and regulations require of process servers. As a result, the process server executes an affidavit of proper service when it has not occurred.

The Effects of Abuse of Service of Process on Consumers

The fact that the overwhelming majority of consumer debt cases filed each year in the Civil Court of the City of New York result in default judgments[2] has raised legitimate concern over the prevalence of sewer service in these cases. In the consumer debt cases handled by our offices, Legal Service NYC attorneys have found improper process service to be the norm, rather than the exception to the rule. Typically, our clients' first notice of a lawsuit against them occurs many years later when their bank account is frozen or their wages are garnished. While the low income consumer struggles to get legal assistance, they are unable to access their money to pay for necessities like food, rent, and medical care. They fall behind on their bills and risk eviction. Other clients only discover these judgments when they are denied credit or housing because the default judgment has appeared on their credit report. When these low income consumers come to Legal Services NYC, our advocates typically find that the process server's affidavit is legally deficient and sometimes fraudulent.

In a recent case handled by Manhattan Legal Services, a elderly client first discovered that she had been sued when her bank account was frozen in January 2009. The client's account contained only $50 in Social Security money. Furthermore, the client had never been notified of any lawsuit against her in 2008. The client came to Manhattan Legal Services who found that the affidavit of the process server contained fraudulent statements. Most notably, the licensed process server claimed to have

[2] In 2008 alone, approximately 319,500 consumer debt cases were filed in the Civil Court of the City of New York. Of these, the majority resulted in default judgments: 74% in Kings County, 76% in the Bronx County, 78% in Queens County, and 68% in Richmond County. Justice Fern A. Fisher, Deputy Chief Administrative Judge, New York City Courts, Presentation to the Civil Court Committee of the New York City Bar Association (March 17, 2009).

served a male roommate in the client's apartment. However, this client lives alone in a studio apartment and does not have a roommate. She is homebound due to her disability and requires the assistance of a home health aide. As a result of the process server's false statements, the client has been unable to use her bank account for ten months and has been charged fees by the bank.

In another case, also handled by Manhattan Legal Services, an elderly client discovered a default judgment on his credit report. Similarly, he was never served with notice of a lawsuit against him and Manhattan Legal Services found that the process server had made false statements in the affidavit of service. This time the process server attested to personal service on the client at an address which does not exist.

Those consumers who are able to obtain legal assistance or advice are often able to vacate the default judgments against them. However, the process servers are currently not held financially responsible for the damage their actions have caused to the consumer.

The Effects of Abuse of Service of Process on Tenants

The most severe impact on the justice system and on the affected litigant occurs when sewer service results in an eviction when the tenant defaults because he or she has no idea that they are being sued by the landlord. As a result of abuses of service of process, a high number of default judgments are entered.[3] In 2008, there were 46,740 default judgments against residential respondents out of 290,986 notices of petitions filed.[4]

In a recent case reported from Legal Services NYC – Bronx[5], the wife of a soldier in the Army was evicted while her husband was stationed in Iraq. Before a landlord can evict a tenant, the landlord must prove that the tenant is not in the military.[6] An affidavit stating that the tenant is not in the military

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[3] NY State Attorney General, NYC Department of Consumer Affairs, NYC Department of Investigation, *A Joint Investigative Report Into the Practice of Sewer Service in New York City*, April, 1986.
[4] Civil Court of the City of New York, *Caseload Activity Report*, Generated on 3/13/2008, Terms 1-13, For 2007.
[5] Submitted by Jonathan Levy, Esq.
[6] Servicemembers Civil Relief Act, 50 App. U.S.C.A. §521.

must be submitted in order to protect those who cannot come to court because they are serving overseas or elsewhere in the United States.[7] The process server in this case falsely alleged in an affidavit included with the warrant application that the soldier's wife said that she was not dependent on someone in the military. The affidavit by the process server effectively undermined federal protections enacted to prevent evictions of soldiers and their dependents.

In another case, also reported from Legal Services NYC – Bronx[8], the tenant was evicted pursuant to a default judgment while he was away in a drug rehabilitation program in Long Island. Personal service of the petition is alleged to have been made at the subject's Bronx apartment on a date when the tenant was actually at the Long Island treatment facility. Clearly, abuse of service of process in each of these

Int. No 1037

This legislation, while not completely preventing the harm that abuse of process service can do to tenants and consumers, provides important new protections. We would like to highlight the beneficial effects this legislation and offer a few suggestions that would make the proposed law even more effective.

Bond Requirement.

We support the conditioning of licensing for process servers and agencies on the posting of a surety bond, as required by proposed §20-406.1. The bond will be available to cover fines and penalties imposed by the Department of Consumer Affairs (DCA) and final judgments recovered by affected New York City residents against the process server or process serving agency. The bond will also increase city revenues by ensuring that fines are paid on time. Injured litigants can make a direct claim to the surety company if the process server violated the law when serving process.

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[7] Servicemembers Civil Relief Act, 50 App. U.S.C.A. §521.
[8] Submitted by James Jantarasami, Esq.

Moreover, the requirement of a bond will help to drive process servers who are consistent abusers out of business. For example, the surety companies may require higher premiums and greater collateral from unreliable process servers and process serving agencies. The surety companies may even deny coverage if the individual or agency is unable to meet the surety company's professional standards. The requirement of a surety bond will substantially increase accountability in an industry in which individuals and companies now routinely violate the law with virtually no penalty.

Responsibilities of Process Serving Agencies

We also support the increased responsibilities the proposed legislation would impose on process servers. §20.406.2(b) of the bill will require process serving agencies to provide employees with a written explanation of employee rights and employer obligations with respect to minimum wage, overtime and hours of work, record keeping, social security payments, unemployment insurance coverage, disability insurance coverage and workers' compensation laws. This new requirement will help low-wage employees who are the most vulnerable to violations of their employment rights. Many process servers are paid as little as $3-$6 per service. If they have to make three attempts as the law requires, they likely would make less than the hourly minimum wage required by state and federal law. This low wage tempts the process server to engage in sewer service. Process servers knowing their rights (and where to make a complaint) will be better equipped to resist the abusive employment practices that contribute to the problem of sewer service.

We also support the requirement imposed by §20.406.2(c) that the employer keep on record for three years an acknowledgment from the employee, verifying that they have received and read the statement of employment rights. This provision increases will facilitate monitoring for compliance with the law.

Finally, we support the requirement of annual training for every process server, as required by §20.406.2(d). This provision will help to increase the knowledge and professionalism of the industry and increase the accountability of process serving agencies for the activities of their employees.

Recordkeeping Requirement.

We support the proposed requirement (§20.406.3(a)) that the process server's log book and other records must be retained for seven years. Enactment of this provision will allow offended parties who do not learn that a default judgment has been entered against them until many years afterwards to contest the bad service.

Department of Consumer Affairs Handbook.

We also support §20.406.4, which requires the development and distribution of a Handbook by DCA. This handbook will allow process servers (who are not lawyers) to have available the applicable laws and regulations governing their conduct. This requirement complements the training mandated elsewhere in the bill.

Amendments to Int. No 1037.

Lastly, we would like to suggest a few minor changes to the language of this bill which we believe will increase its effectiveness and prevent unintended consequences. First, many unrepresented low-income litigants, lack the resources to pay for process service and must rely on friends or family to serve court papers. We recommend amending §20-403 (a) to require licenses only of those who "do business as a process server," instead of the current "perform the services of a process server." The language is consistent with the definition of process server in §20-404 (a) and (c), which defines process to those who do business as a process server, meaning they serve process five or more times in a year. In addition, we support adding an exemption to the surety requirements for a process server who is employed by a "not for profit organization" in §20-406 (c). These amendments would leave intact the goals of the proposed bill, which is to protect against abuses by irresponsible process servers, while at the same time ensuring greater access to the courts for low-income litigants.

Conclusion

We commend the City Council for dealing with this serious issue and strongly urge passage of Int. No. 1037.

Respectfully submitted,

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COMMENTS IN SUPPORT OF INT 1037-2009, A LOCAL LAW TO AMEND THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK, IN RELATION TO PROCESS SERVERS

Submitted to the Consumer Affairs Committee of the New York City Council at its Hearing, November 13, 2009
by Professor Gina Calabrese, Professor Albert Beer, and Professor Richard Bennett of St. John's University

These comments in support of Int 1037-2009, a local law to regulate process servers in the City of New York, are being submitted by three faculty members of St. John's University: one from the law school and two from the business school. Professor Gina Calabrese is a Professor of Clinical Education and Associate Director of the Elder Law Clinic. The Elder Law Clinic is a law school course in which students, supervised by faculty members, provide legal representation to low-income seniors in Queens in a variety of consumer matters, mostly related to mortgage, deed fraud, home improvement contractor disputes, and consumer debt.

Professor Albert Beer is the Michael J. Kevany/XL Professor of Insurance and Actuarial Science, St. John's University's School of Risk Management and Actuarial Science at the Peter J. Tobin College of Business. Before joining St. John's in 2006, Professor Beer had a thirty-year career in the insurance industry, most recently as President of American Re-Insurance Company's Strategic Business Units. He has held positions as Chief Actuary and Director of Alternative Risk for the Skandia America Group, and was a Partner with the consulting firm Tillinghast, a division of Towers,

Perrin. He is a Fellow of the Casualty Actuarial Society, and has served as the Society's President. Professor Beer serves on the Board of The Actuarial Foundation, a philanthropic organization, sponsoring research, education, and communication initiatives designed to utilize actuarial talent to address societal issues.

Professor Richard L. Bennett holds the Met Life Teaching Chair in Risk Management at St. John's University's School of Risk Management and Actuarial Science at the Peter J. Tobin College of Business. Professor Bennett has extensive experience in the Risk Management and Insurance field having held management positions in underwriting and claims. He has additionally designed and conducted seminars in Risk Management for several international insurance companies. He holds the following eleven risk management professional designations: CPCU, ARM, ARe, AIC, AU, AMIM, AAI, API, ARC, RPLU, AIM.

These three St. John's faculty members have taken an interest in Int 1037-2009 because of the work of the Law School's Elder Law Clinic. More New Yorkers find themselves struggling with debt, and Queens senior citizens are no exception. Over the past decade, the Clinic has seen a steady increase in the number of requests it receives from seniors who are in debt, and in the past year, we have been receiving such requests on a near daily basis. When our clients are sued for a credit card debt, rarely are they properly served with the summons and complaint. Every time we have brought a motion to dismiss a case for lack of proper service, we have won. "Sewer service" seems to be rule in this class of cases, not the exception. Sometimes clients come to us only after a default judgment has been entered against them. The default is entered because the client is not properly served.

The impact on the elderly is severe. One of our clients, Mrs. M was a retired federal employee and a homeowner in St. Albans, Queens. She was 85, and suffering from cardiac and respiratory conditions, when in December 2005, an oil company that had a default judgment against her restrained her bank account, all of which consisted of directly deposited Social Security and a government pension. Mrs. M's total income is less than $900 per month. Her bank took $100 from her account as a legal processing fee, which it never refunded. The Clinic advised the oil company's attorneys that the funds in Mrs. M's accounts were exempt, having come from Social Security and a pension. Nevertheless, just after New Year's Day of 2006, while the documentation to have Mrs. M's account released was being gathered, a city marshal removed the contents of her bank account, and paid it over to the oil company. Mrs. M's account was released in February 2006, but the same law firm restrained her account again, just before Thanksgiving of 2006. The holiday weekend delayed the release of her account. While her account was frozen, Mrs. M was unable to purchase heating oil, which she needed. Other utility bills were due, and she could not pay those. Eventually, the Clinic secured the release of the account and the return of the funds taken by the city marshal and paid to the oil company. They were Social Security and pension monies, which are exempt from judgment execution.

The Elder Law Clinic supports INT 1037-2009 because it would help to curtail the types of process server abuses that led to Mrs. M's hardships, and to the hardships of other clients who were unable to purchase medicine and food and were charged bank fees because of a default judgment. Harm to one's credit record is another type of problem our clients have experienced because of default judgments. The Elder Law Clinic also supports amendments to strengthen the law, as proposed by some of our colleagues from legal services organizations.

The only specific part of the legislation these comments address pertains to the bonding requirement. Representatives of the process server industry have characterized the bonding requirement as a "get out of jail free card," alleging that the availability of the bond to cover fines and judgments assessed against bad actors in the industry would actually promote continued poor performance by process servers. The industry's argument, however, is based on specious reasoning and a misunderstanding of surety bonds, as explained below, in an analysis prepared by Professors Bennett and Beer, of the Peter J. Tobin College of Business at St. John's University.

The initial claim that bonding would result in poorer performance simply because the bond exists is usually associated with insurance. This "moral hazard" as it is termed, states that the mere existence of insurance brings about a sense of carelessness and indifference on the part of the insured such that they may fail to take needed action with respect to their property or activities. It is not the case with surety. Moreover, with insurance, the insurer expects losses and loads a certain factor into the premium calculation to account for losses within a certain class or group. Additionally, insurance is a two party arrangement (insured/insurer) where the obligation of the insurer is to indemnify the insured for all losses covered under the contract in the case of property insurance or to indemnify a third party for all losses caused by the negligence of the insured in the case of liability insurance. Once the insured has received either direct payment or protection under the policy there is no expectation of reimbursement on the part of the insurer. The company has simply honored its obligation under the policy.

However, in the case of surety the situation is entirely different. The nature of the situation is that the Surety expects no losses because it diligently investigates the principal (one who performs a duty) to determine creditworthiness, character, etc. prior to issuing the bond. Moreover, surety is a three party arrangement involving the principal, obligee (the one for whose benefit the bond is taken out) and the guarantor or surety(finance company or insurance company). In the process server situation, the principal (process server) would be required to take out a performance bond for the benefit of the obligee (the person requesting the services). Should the principal fail to perform his/her duties or be found guilty of misfeasance or malfeasance, the obligee would make a claim against the bond. **If the surety pays out in this circumstance they have the right to proceed against the principal (process server) to recoup any money paid (indemnity agreement).**

The surety is more of a **financial guarantee or credit arrangement.** One party's obligation is literally being guaranteed by another. On the basis of the reputation and character of the principal, credit is being extended. Hopefully, the surety will not have to encounter any loss payments but if they do, reimbursement by the principal is definitely

involved. Thus, the prospect of having to reimburse the surety for payment on the bond would act as a deterrent to poor performance.

The requirement of bonding for the process server may impose greater costs initially, but because of the due diligence by the surety in investigating the principal it might very well weed out those principals that have undesirable past records or who have demonstrated a distinct failure to adhere to professional standards. A ***properly regulated*** surety program for process servers could have many advantages. Theoretically, all servers would have to be underwritten as to their capability. In addition to the bonding requirement, an educational standard could also be imposed whereby a knowledge based test must be passed in order to become licensed. Many states require such standards and New York has chosen not to have any. It's high time that changed. In short, at least there would be some measure of training and, perhaps more importantly, accountability.

In an ideal scenario, underwriters (and/or regulators) would conduct a diligent review of each server's performance and negligent servers would not be able to obtain bonds based on their flawed practices (similar to having too many moving violations and losing one's driver's license). Admittedly, a flawed and ineffective underwriting process would not weed out the bad apples. However, it is reasonable to argue that some elementary bonding process would introduce a form of underwriting review/accountability that would at least address some of the more egregious practitioners. The bond could be based on a flat rate for individuals or for agencies that employ process servers or could be based on a percentage of the debt obligation to be collected. As with insurance, the bond may give process servers a (false) sense of comfort regarding the financial implications of their actions, but the inability to obtain a bond at a reasonable cost (or none at all!) can be a powerful motivator for personal and corporate behavior modification. Given the current level of regulation of process servers, bonding could add ***some*** improvement.

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I represent: N.Y.S. PROFESSIONAL PROCESS SERVERS ASS'N

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