

August 10, 2022

Commissioner Vilda Vera Mayuga
Department of Consumer and Worker Protection
42 Broadway
New York, NY 10004

Dear Commissioner Mayuga,

On behalf of the New York Legal Assistance Group (“NYLAG”), we offer the following comments on the Department of Consumer and Worker Protection’s (“DCWP”) proposed amendments to the rules applicable to the process servers licensed by DCWP. As attorneys and advocates working directly with New Yorkers who are served with process, or more often, who are alleged to have been served with process but fail to receive actual notice of a lawsuit, we seek to share our experience and provide relevant feedback regarding the proposed amendments. NYLAG applauds DCWP’s continued efforts to safeguard the integrity of process serving laws and regulations that ensure that all litigates receive timely and proper notice of legal proceedings and have their due process rights honored. The below letter provides some background on our work and specific comments about the proposed amendments.

I. About NYLAG

NYLAG is a not-for-profit legal services organization located in New York City. NYLAG uses the power of the law to help New Yorkers in need combat social and economic injustice. We address emerging and urgent legal needs with comprehensive, free civil legal services, impact litigation, policy advocacy, and community education. NYLAG serves immigrants, veterans, seniors, the homebound, families facing foreclosure, renters facing eviction, low-income consumers, those in need of government assistance, children in need of special education, domestic violence victims, people with disabilities, patients with chronic illness or disease, low-wage workers, low-income members of the LGBTQ community, Holocaust survivors, as well as others in need of free legal services.

In particular, NYLAG represents litigants in every court system in New York State and works with thousands of unrepresented litigants each year. Specifically, through its Consumer Protection Unit, NYLAG works with thousands of consumers every year who face litigation, but because of unlawful practices by process servers, never receive notice of the lawsuit. This lack of notice creates catastrophic consequences for New Yorkers, many of whom are low income, have limited English proficiency, and are unfamiliar with the court system. When New Yorkers are deprived of their day in court because they never receive notice of a lawsuit, the resulting default

judgment results in wages being garnished, bank accounts frozen, loss of housing, and other severe consequences that threaten their financial stability and even health and wellbeing.

It is crucial to ensure that process servers act lawfully and fulfill their responsibility to properly deliver notice of lawsuits so that New Yorkers are not unfairly deprived of their day in court and do not face consequences of losing without ever even knowing that a case had been filed. Sewer service—the practice of falsely claiming to serve litigants with notice of the lawsuit when no notice was ever provided—is endemic in the New York State Court System and is a well-documented phenomenon.¹ Advocates have brought multiple class action lawsuits challenging the sewer service practices of plaintiffs who file thousands of lawsuits in the New York State Courts.² The New York State Attorney General has even been required to take action against process serving agencies who routinely falsified affidavits of service and engaged in widespread fraud by filing knowingly false affidavits of service.³

Sewer service disproportionately impacts New Yorkers who have the least access to resources and are forced to navigate legal proceedings *pro se*. The New York State Court of Appeals noted: “Often associated with consumer debt collection and landlord-tenant litigation, questionable service practices have their greatest impact on those who are poor and least capable of obtaining relief from the consequences of an improperly imposed default judgment.”⁴ NYLAG’s clients are among those forced to face the severe consequences of default judgments due to lack of service. Our clients are deprived of their due process rights when process servers fail to fulfill their duties to provide notice of lawsuits in conformity with the law.

II. Recommendations

NYLAG applauds the DCWP’s efforts to ensure that process servers maintain true, accurate, and complete records of service and that those records of service are legible and available. NYLAG supports the creation of a digital method for maintaining records of service. However, we suggest that DCWP use this transition to electronic

¹ See, e.g. The Legal Aid Society et. al., *Debt Deception: How Debt Buyers Abuse The Legal System to Prey on Lower-Income New Yorkers 1* (May 2010) available at http://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf; Mobilization for Justice, *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 (DATE)* available at http://mobilizationforjustice.org/wp-content/uploads/reports/Justice_Disserved.pdf.

² See, e.g., *Burks et al. v. Gotham Process et al.*, 20 Civ. 1001 (E.D.N.Y. 2020) (class action case filed by NYLAG complaining of defendants’ unfair practices in failing to lawfully serve process); *Dupres v. Houslanger*, 19 Civ. 6691 (E.D.N.Y. 2019) (class action complaint filed by NYLAG complaining of defendants’ unfair practices in litigating and opposing consumers’ challenges to motions challenging service of process); *McCrobie v. Palisades, et al.*, 1:15-CV-00018 (class action challenging the unfair practices of enforcing aged judgments that were obtained through alleged failure to serve process); *Sykes v. Mel Harris*, 09-CV-8486(DC) (S.D.N.Y.) (class action alleging improper service in debt collection cases.)

³ *Pfau v. Forster & Garbus et al.*, Index No. 2009-8236 (Erie County Supreme Court) (July 2009)

⁴ *Barr v. Department of Consumer Affairs*, 70 N.Y.2d 821, 822-23 (1987).

record keeping as an opportunity implement four changes: 1) Extend the amount of time by which individual process server and process serving agency licensees must retain records related to service of process; 2) Provide that upon request records related to service must be made available within a reasonable amount of time to a litigant challenging service of process in a judicial proceeding; 3) Increase penalties assessed for process servers' and process serving agency's failure to comply with the rules; and 4) Require that process servers record detailed information describing the location of service of process. These changes will not be overly burdensome for the licensee given that all records will now be in electronic form.

A. Increase the Amount of Time Process Servers Must Retain their Records

NYLAG also strongly urges the DCWP to increase the period for retention of process server records. As judgments can be enforced for a period of up to twenty years⁵, NYLAG strongly recommends that process servers and process serving agencies be required to maintain records for the same amount of time.

Increasing the required time period for records retention will provide for fairer adjudication of issues related to personal jurisdiction and improper service. Access to records relating to service is vital, as many litigants do not learn about default judgments obtained through falsified service until long after the records related to service have been destroyed. NYLAG routinely works with litigants who first learn about a default judgment about which they had no notice more than a decade after the lawsuit was initiated.

For example, NYLAG recently assisted Luis⁶ through the Consumer Debt Volunteer Lawyer for a Day ("VLFD") program in Queens County Civil Court. VLFD is a program created by the Office of Court Administration that provides limited scope representation, advice, help with negotiating settlement agreements, and arguing motions before the judge to unrepresented litigants in consumer debt cases. VLFD representation is limited solely to the day on which the consumer has an appearance in a debt collection case. Luis had challenged a default judgment based on the fact that he had not received any notice of a lawsuit (allegedly commenced in 2003) until late 2021, when the judgment creditor levied his bank account. Despite the passage of *over eighteen years*, the creditor was executing on a judgment about which Luis had no knowledge, not only creating extreme financial hardship, as Luis lost access to his funds, but a logistical challenge as well. Luis had to figure out why his bank account was frozen while he knew nothing about the lawsuit and had no access to any information.

Upon learning of the judgment, Luis immediately went to court to challenge the default judgment on the basis that the court lacked personal jurisdiction because he

⁵ N.Y. C.P.L.R. § 211(b).

⁶ Names and identifying features have been changed to protect the confidentiality of clients.

had never been notified of the lawsuit. Due to Luis' advocacy, the court found that the presumption of service had been rebutted and scheduled a traverse hearing to determine if service had been proper. At the traverse hearing, the process server appeared but had no records of the service. The process server alleged that he had destroyed the records due to the passage of time. This lack of information severely hampered Luis' ability to challenge the process server's credibility and deprived him of an opportunity to assert his legal rights.

Requiring process servers to maintain their records for the same period that a judgment can be enforced would prevent unfair situations like this from occurring. Since creditors enforce judgments decades after they are entered, and litigants may only learn about judgments years after they are entered, process servers and process serving agencies should be required to maintain their records for a minimum of twenty years.

B. Require Process Servers to Make Records Available upon Request

As described above, due to widespread sewer service, particularly in consumer debt and landlord tenant matters, many defendants only learn about a lawsuit after a default judgment has been entered against them. Frequently, defendants are only aware of a lawsuit when the plaintiffs attempt to execute on the judgment, many years after it was entered.

In order to ensure that all litigants have equal and complete access to all records relevant to a case, particularly in situations where a defendant may not learn about the judgment until years after the judgment was entered, the rules should establish a mechanism for litigants to request records of service relating to their case. The rules should require process servers and/or process serving agencies to comply with these requests and provide copies of records related to the service, such as the process server's logbook and/or electronic records of service and GPS records, within a reasonable amount of time of the request.

In conclusion, we encourage DCWP to expand the record keeping requirements to allow for better transparency and easier access to records related to service of process. These recommendations will help ensure that unrepresented defendants are alerted to lawsuits against them and they are provided full opportunity to assert their legal defenses in a timely and fair manner.

C. Increase the Penalties Assessed for Failure to Comply with These Rules

The consequences of improper service are devastating for New Yorkers who are robbed of their day in court because of a lack of notice. Increasing the penalties assessed, particularly those related to 6 RCNY § 2-234 (failure to comply with all federal, state and municipal laws, rules, regulations, and requirements); Admin Cod. § 20-406.3 (failure to maintain proper records); and 6 RCNY § 2-235 (improper

preparation or maintenance of affidavit of service) will deter process servers from engaging in unlawful behavior or falsifying affidavits of service. Raising the financial penalty for unlawful behavior will mean that process servers can no longer consider violations a mere “cost of doing business” and will incentivize strict compliance with the rules that govern process server conduct.

D. Mandate that Process Servers Report Detailed Data About the Location of Service

In addition to the information process servers are mandated to collect, process servers should be required to collect additional information about the service. Requiring the collection of additional information will incentive process servers to complete service of process in accordance with the law. Additionally, requiring the collection of more information will make it easier for litigants who are asserting a personal jurisdiction defense due to lack of service to demonstrate that service was, in fact, improper.

Specifically, for all forms of service, not only service effectuated pursuant to CPLR § 308(4) or RPAPL § 735, process servers should also be required to provide a description of the premises where service was effectuated, noting if the service address is a private home, multi-family home, apartment building or other type of dwelling; the color of the address and a general description of its appearance. Many process servers do include this information, but the rules should mandate that they do so. Process servers should also be required to report how they gained access to the premises, report the total amount of time expended on the service attempt, and be required to take a GPS photo of the front door of an apartment, rather than the building, if the process alleges nail and mail service. We submit that these additional data points will not be burdensome given that the information can be recorded electronically.

III. Conclusion

In conclusion, we applaud the DCWP for taking steps to ensure that process servers fulfill their obligations when undertaking service. We encourage DCWP to expand the record keeping requirements to ensure that anyone who is faced with the consequences of a default judgment as result of improper service has access to the records of service regarding their case. The above recommendations will help ensure that debt defendants are alerted to lawsuits against them and given full opportunity to assert their legal defenses in a timely and fair manner.

Sincerely,

Lisa Rivera, Esq.
President and Attorney-in-Charge
Daphne Schlick, Esq.
Director, Consumer Protection Unit
New York Legal Assistance Group

100 Pearl Street, 19th Floor
New York, NY 10004
(212) 613-5000