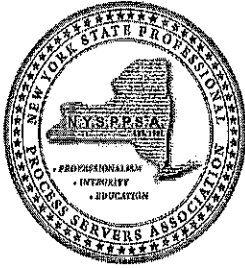


NEW YORK STATE PROFESSIONAL PROCESS SERVERS ASSOCIATION



August 9, 2024

President:
Paula Parrino

1st Vice President:
Ellen Eakley

2nd Vice President:
Jenn Simmons

Secretary:
Jillina Kwiatkowski

Treasurer:
Jason Tallman

Directors:
Sue Cortina
Josh Miller
Bernard E. Hughes
Andrew Mega

Past Presidents:
Irving Botwinick*
Bruce Lazarus*
Bob Gullinello*
Vincent Gillis*
Mark McClosky*
Joel Graber*
Jillina Kwiatkowski
Bruce Kenney*
Larry Yellon
Gail Kagan
Ellen Eakley
Jason Tallman
*Founding Members

Brenda Geedy
Administrator

Via Attachment / <http://rules.cityofnewyork.us/>
New York City Department of Consumer and Worker Protection
42 Broadway #5
NY, NY 10004

Re: Proposed changes to Process Server Rules

Dear Sir or Madam:

I am the current President of the New York State Professional Process Servers Association and would like to submit some comments/suggestions regarding the proposed rules.

1. Proposed Rules Page 4:

Section 2-233 Records (a) (2) Content of records of service, (x):

"the address where service was attempted or effected, which must be entered [as] in [three] five different fields: [such that one field will be for the street address and any apartment, suite, or room number, the second field will be for the city or borough and the third field will be for the ZIP code] the first field will be for the building number; the second field will be for the street name; the third field will be for address details, e.g., apartment, suite, floor or room number; the fourth field will be for the city or borough; and the fifth field will be for the ZIP code;

Comments:

If the Rules are passed, when will the rules go into effect? I ask this because it would seem, based upon my conversation with some third party providers, that a change in the data structure to add fields, while it may seem to be something not extraordinarily overwhelming can actually be quite significant, especially to larger third party providers who work with process servers all over the country and not just specifically in the City of New York. While there is no concern about the addition of the fields from a service standpoint, from a practical provider standpoint it appears to be troublesome, as the larger providers have many customers across most, if not all of the states, and in many different cities. By mandating how these providers need to encapsulate the data structure and storage, it will take a great deal of time and will possibly make their other customers use additional fields and take additional steps that is not wanted or needed.

From a process server standpoint, the concern could be increased fees from the third party providers to cover the cost of these changes, thus raising the cost of service, not just for the servers, but the agencies and all of the clients utilizing services. This could have a negative, unintended consequence for all litigants involved in actions. In addition, what happens if a number of the current third party providers no longer want to work with servers in New York City?

Phone: 888-258-8485

P.O. Box 925
Orchard Park, NY 14127

Fax: 877-258-8484

2. Page 5

Section (xviii) adds "or affirmation."

(2) required records. Process serving agencies must maintain, at a minimum, the following records:

(iv) A copy of every affidavit of service and affirmation of service signed by the process server for service assigned the process serving agency;

The use of the word "and" instead of "or" or even "and/or" would seemingly indicate the combining of things, as "and" is conjunctive, whereas "or" is disjunctive and separates things. We believe that the usage of "and" creates ambiguity and inconsistency; respectfully, we request that the text be changed to as follows:

"... copy of every affidavit of service or affirmation of service..."

This same issue is found in several other spots throughout the text:

Page 11 under Section 2-234 Duty to Comply with Law:

"... relating to the conduct of licensees and the service of process in the State of New York and the preparation, notarization and filing of affidavits of service; and the preparation and filing of affirmations of service and other documents, now in force or hereafter adopted during any license period..."

Page 12 at the top of the page under letter (a):

... The licensee must include [his/her] their license number on all affidavits of service and affirmations of service ... each affidavit of service and affirmation of service, the licensee must ..."

Page 13 under Section 2-240 Audits (a) (2):

"Affidavits of service and affirmations of service filed with a court by a process server"

3. Page 6 letter (c) Storage of Records with a third party contractor:

(8) produce to the Department upon request [an MS Excel spreadsheet of] the electronic records containing [the fields and data format] required information set forth in 6 RCNY Section 2-233(a)(2) in the format provided by the Department on its website."

I feel it is best left to the third party providers to speak on this issue, as it involves their area of expertise.

4. Page 7 section 2-233b changes [his or her] to "their" which is not an issue.

5. Page 8 has a significant change to the rule which we believe needs to be reconsidered:

Under Section 2-233b Electronic Record of Service / GPS Requirements (a)(2) Operation of Equipment (i) ... If no GPS signal is available at the time of attempted or effected service of process,

the location, time and date will be determined by triangulated cell tower signals. The process server is not in compliance with this provision if its electronic record was made before the time of attempted or effected service. There shall be a rebuttable presumption that the process server was not in compliance with this provision if its electronic record is made more than five minutes after the time of attempted or effected service."

Comments:

1. Currently, the standard in which some process servers handle the taking of GPS images is upon arrival at the location for service, a server will lock in their GPS coordinates. This is done for several reasons, but the most important and prevalent reason is for safety concerns.

Unfortunately, process service is a dangerous profession and process servers throughout the city, state and country are encountering more belligerent, aggressive and volatile defendants/respondents than ever before. While, as process servers, we are actually securing and protecting the defendants/respondents' right to be heard, many litigants are angered by the notice that our service provides. Additionally, needing to record all of the information for the service within a time of five minutes sets the clock ticking. What happens if a server is in a dangerous building with gang activity or is in a building with a lot of drug activity? Similarly, the server could be looking for a way out of a building that has non-working elevators and must climb down stairwells or the like. We have had instances where aggressive and dangerous dogs have been let out on the servers and I know of many servers who have suffered dog bites. The idea that in the midst of trying to protect themselves and get out of a potentially dangerous situation that they must do everything possible as mandated within five minutes, so the service is considered valid is unreasonable. Certainly, in those instances, a server would not want to go back to once again serve those papers after a threat, aggressive behavior or worse.

By mandating that the process server is not in compliance with the provision if the electronic record is made before the time of service, there is a rebuttable presumption on non-compliance if the electronic record is made more than five minutes after the time of attempted or effected service is faulty reasoning. Respectfully, we aver that to make an inference that is derived from a gap of more than five minutes that service is non-compliant is unreasonable. For a process server to need to rebut the presumption by evidence is in direct conflict with the proposition that a process server's affidavit of service establishes a prima facie case as to the mode of service and gives rise to the presumption of proper service (Second Department, *Wells Fargo Bank, N.A. v. Enitan*, 2021). The presumption of valid service can be rebutted by a defendant's averment otherwise. Yet, here with the language of the proposed new rule, there is a presumption of non-compliant service.

Further, one can argue that the act of service is a process that takes time and is not just when the server locks in a coordinate or rings a bell or knocks on a door.

Lastly, how does this rule impact the rule that the server has 72 hours to upload the service information?

6. Pages 8-9 also includes the addition of the following:

(iii) Each electronic record must include, at a minimum, the following information:

(a) a unique file identifier of the process being served;

(b) plaintiff or petitioner, which must be specified by the last name of the first plaintiff, or, if not a natural person, the name of the entity, except that the field may contain the name of

every plaintiff or petitioner in the case, provided that the entire record is searchable by a wildcard search of the name of any plaintiff or petitioner;

(c) defendant or respondent, which must be specified by the last name of the first defendant, or, if not a natural person, the name of the entity, except that the field may contain the name of every defendant or respondent in the case, provided that the entire record is searchable by a wildcard search of the name of any defendant or respondent;

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

(e) the date that service was effected or attempted according to the device, entered as MM/DD/YYYY;

(f) the time that service was effected or attempted according to the device, entered in military time;

(g) the date that service was effected or attempted according to GPS or cellular signals, entered as MM/DD/YYYY;

(h) the time that service was effected or attempted according to GPS or cellular signals, entered as military time;

(i) the location where service was effected or attempted, which must include building number, street name, address details, e.g., apartment, suite, floor or room number, city or borough, ZIP code, which must be five digits, and latitudinal and longitudinal coordinates returned by the GPS device in decimal degree format. All address information must be CASS (Coding Accuracy Support System) processed to ensure its accuracy with software graded to be CASS Certified by the National Customer Support Center of the United States Postal Service;

(j) the name of the intended recipient of the process, which must be entered in two data fields such that the first data field is the last name of the intended recipient, or, if not a natural person, the name of the entity, and the second data field is the first name of the intended recipient if a natural person;

(k) the name of the person to whom process was delivered, which must be entered in two data fields such that the first data field is the last name of the person, and the second data field is the first name of the person; and

(l) the DCWP license number of the process server, specified as a seven-digit number, where the first number must be zero if the process server's license number is less than seven digits, the DCWP license number of the process serving agency from whom the process was received or, if not received from a process serving agency, the name of the person or firm from whom the process was received.

Comments:

I am unsure of what this section is getting at; my only concern is if, when naming defendants/respondents (particularly in a mortgage foreclosure action), et al. is frequently used. Will that cause an issue with what this rule is trying to put in play?

Similarly, in a mortgage foreclosure, if serving at the property to be foreclosed, a tenant is encountered and a name is refused, the fictional name of "John" or "Jane Doe" is used as a designation. Will somehow

that use run afoul of what is being proposed. Additionally, when a person in any action refuses a part of their full name, will that cause issue with what is contemplated above?

7. Page 12 (continued from page 11)

Section 2-235 Preparation of Affidavits of Service or Affirmations of Service

The new language includes:

A process server purporting to serve a business entity by delivery of papers to an individual that the process server, upon personal knowledge, avers in the affidavit of service or affirmation of service to be the "agent," "managing agent" or "general agent," or other individual authorized to accept service, also must state in the affidavit of service or affirmation of service, at a minimum: (1) that the process server inquired if that individual was authorized to accept service and received an affirmative response; (2) that the process server inquired of the individual their name and job or responsibilities and the individual's responses; and (3) facts confirming or explaining the statement that the process server knew the individual served was the type of agent specified in the affidavit of service or affirmation of service.

Comments:

The only issue here is that the affidavit/affirmation will need to be longer and include with specificity the questions and answers as set forth above.

From a provider standpoint, for those agencies/servers who use a provider database, it would need to be determined how quickly a change like this can be done in order to ensure compliance. Also, will there be a significant cost increase for this implementation that could eventually be borne by a defendant/respondent in an action?

8. On Page 12, the following language is also added:

(b) A licensee must not make any false statement in an affidavit of service or affirmation of service.
(c) The commissioner may deny any license application or refuse to renew any license, and, after due notice and opportunity to be heard, may suspend or revoke such license, if the applicant or person holding such license, or where applicable, any of its officers, principals, directors, members, managers, employees, or stockholders owing ten percent or more of the outstanding stock of the corporation, has been found, in connection with the applicant's or licensee's business, to have made a false statement in an affirmation of service or affidavit of service.

Comments:

A licensee should never **knowingly** make a false statement in an affidavit of service or an affirmation of service. The question is what the definition of "false statement" entails. Certainly, a typographical error would not be a "false statement." Thus, a way to define false statement seems necessary so as not to categorize any issue that may require an amendment to be a "false statement." Courts recognize typographical errors and ministerial errors on affidavits [affirmations] and do not discount the service or impugn the process server's credibility for such issues.

9. Further, on page 12, I believe there is a typographical error in letter c and under Section 2-235a Duty to Testify Truthfully: I believe "owing" was meant to be "owning."

10. Regarding Page 12, under Section 2-235a Duty to Testify Truthfully the following is stated:

(a) A licensee must not make any false statement in an affidavit of service or affirmation of service.

(b) The commissioner may deny any license application or refuse to renew any license, and, after due notice and opportunity to be heard, may suspend or revoke such license, if the applicant or person holding such license, or where applicable, any of its officers, principals, directors, members, managers, employees, or stockholders owing ten percent or more of the outstanding stock of the corporation, has been found, in connection with the applicant's or licensee's business, to have made a false statement in an affirmation of service or affidavit of service.

Comments:

It should go without saying that anyone signing an affidavit of service or affirmation of service understands that they are testifying under the penalties of perjury that a false statement material to the action would be a cause for alarm. Again, the question of how a "false statement" is defined should be clearly addressed in order to avoid any ambiguity or controversy.

Also, a cause of concern for those in our industry is the perception amongst servers in our industry that the DCWP appears to believe that if a traverse hearing is ordered, the process server must have done something wrong during the service. Acquiring jurisdiction through service of process is essential in our client's cases. One of the easiest forms of challenge to make from a defendant/respondent standpoint is to allege that service was defective or never accomplished. At a certain point, a traverse hearing may eventually be held to determine if the defendant/respondent was served in accordance with the relevant laws.

One of the main challenges currently in the traverse hearing realm is the argument that defendant/respondent attorneys are using the fact that a process server signed a consent order with the DCWP as a way of attacking the server's integrity. While an attorney is present to represent the litigant's rights during the traverse hearing, the process server acts solely as a witness to testify as to their role in acquiring jurisdiction. The process server's records are used as evidence at the hearing and, even when a judge finds that a process server has been credible, may still find in favor of a defendant/respondent for various reasons.

A server may serve hundreds or thousands of papers a year. It is reasonable to believe that a certain percentage/number of those papers may be challenged for service, as process service is one of the building blocks of a successful case for a plaintiff/petitioner. In addition, at times a defendant/respondent is aware that they are about to be served with legal documents and attempt to evade service or deceive the process server.

The presumption that a process server is a "sewer server" because of a lost traverse hearing or is not worthy of license renewal or continuation is a false equivalency. There have been times where defendant/respondents not only actively evade service, but they also tell falsehoods in an effort to avoid service.

11. Pages 13 and 14 add the following language:

"Each failure to comply is a separate violation ..."

There is no "cure period" referenced herein and the Mayor's certification specifically states that the rule "(iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation," however clearly this is not accurate.

Additionally, as mentioned above, one of the most detrimental parts of the traverse hearing for a process server is when opposing counsel makes note that the server has signed a consent order with the DCWP and uses that to impugn a server's credibility. As a part of the traverse hearing, if the attorney for whom the server testifies is unfamiliar with the case or rules of service (many times per diem counsel are hired for these hearings and are often unfamiliar with service of process) then the server is left without sufficient opportunity to be heard and then is also likely to be more heavily scrutinized due to a lost traverse hearing.

Lastly, there is new legislation awaiting the Governor's signature (Bill S7801 / Assembly matching bill 8081A) that wants to amend the wording of the CPLR Section 306 to change the way a person is identified on an affidavit or affirmation of service. The goal of this act, as stated, is to stop civil discrimination. I am unsure of the process by which the new rules are promulgated and how daunting or not it may be. If I may offer a suggestion should the process be time consuming and lengthy; perhaps it is best to await the governor's signing into law the new bill before proceeding with the amendments proposed.

As we have discussed in the past, our Association is aware of the necessity for upholding standards for effective service of process in the City and we appreciate the efforts made by the DCWP in regard to those standards. We believe that the proposed comments above should help demonstrate why some of the proposed rules may need to be adjusted or defined, as it is important to consider all of the circumstances which may affect the ability of a process server to fully comply with the proposed regulations, especially when personal safety is a significant factor.

The Association thanks you for your time and consideration in review of our comments and suggestions and for your continued efforts on behalf of all New Yorkers, including our process servers.

Sincerely,



Paula Parrino, Esq.
President, NYSPPSA