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Advocacy Note

Public Interest Lawyers Are Key in Passage of Landmark Legislation to Stem "Sewer Service" in New York City

Legislation that New York City Mayor Michael Bloomberg signed on April 14, 2010, cracks down on the abusive practice of not actually giving people notice of lawsuits but instead throwing court papers in the "sewer." The new law requires all service attempts in New York City to be recorded with global positioning system (GPS) devices. All licensed process servers and process-serving companies must obtain surety bonds. The law includes a private right of action against unscrupulous process servers. Because sewer service is a nationwide problem, especially in debt collection cases, the story of how a handful of public interest lawyers contributed to the bill's passage is worth telling.

During the 2000s debt collectors in New York City catapulted sewer service from a housing court annoyance to a regular calamity in civil court where most debt collection suits are filed. The elderly, disabled, and working poor beat steady paths to legal services offices with complaints of frozen bank accounts or garnished wages. In most of these cases these prospective clients were not properly served, and had not answered or appeared, resulting in default judgments. Also, in most cases, the plaintiffs were debt buyers who purchased tens of thousands of debts for a few cents on the dollar from original creditors whose own collection attempts had failed. Debt buyers had flocked to New York after a new law in 2000 enabled them to search bank records electronically for the accounts of debtors with unpaid judgments.

In trying to unfreeze bank accounts or stop wage garnishments, clients invariably told legal services lawyers that they never knew of the lawsuits until their incomes were seized through postjudgment procedures. Reviews of process-server affidavits inevitably supported such claims: the process servers usually said that no one was home when they attempted service or that someone (unknown to the client) opened the door and accepted the papers.

The Law Has Certain Requirements of Process Servers

Due process requires that a plaintiff notify a defendant when the defendant is sued. New York's rules of civil procedure require a process server to give such notice in one of three ways (N.Y. C.P.L.R. § 308 (McKinney 2010)). The primary (and best) method is personal service. If personal service cannot be done (e.g., the defendant cannot be found at home or at work), then a process server may use "substituted service" by leaving the court documents with someone of "suitable age and discretion" at the defendant's home or business and subsequently mailing a copy of the documents. If personal service or substituted service cannot be achieved after "due diligence" (usually three visits to the home or business), a process server is permitted to use "nail and mail" service, whereby the process server attaches the court papers to the door of the defendant's home or business and then mails a copy of the papers. Upon completion of service, a process server must file an affidavit of service detailing the time and date of service, complete with a physical description of the person served, if applicable.

In addition to following state law, process servers must be licensed to effect service regularly in New York City and comply with local rules. Both state and city law require process servers to record information about all service attempts chronologically in a bound "process server logbook."

Allies Research Sewer Service

In 2005 the Urban Justice Center, a nonprofit, law reform organization, began representing low-income people sued for credit card, cell phone, and medical debt. In 2007, as part of its mission to publicize problems affecting marginalized New Yorkers, the Urban Justice Center published a broad critique of debt collection (Urban Justice Center, Debt Weight: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor (Oct. 2007), http://bit.ly/csvRh6). A staggering 320,000 consumer lawsuits were filed in New York City in 2006 (more than the entire federal court docket in fifty states) (*id*. at 1). The default judgment rate (meaning the rate at which defendants never appeared in court) was 80 percent (*id*.). Defaults, which are processed by clerks, benefitted debt buyers who rarely possessed the original creditors' documents needed to prove their cases before judges (*id*.). While anecdotal evidence suggested that sewer service was the main cause of defaults, the report did not include hard evidence of this theory.

Following the Urban Justice Center report, advocates grappled with how to deal with the sewer-service problem. Case-by-case litigation seemed futile: besides the sheer number of cases, most debt collectors routinely withdrew their default judgments when a lawyer challenged their process servers' alleged service. A major lawsuit also seemed premature since little was understood about the process-serving industry. Indeed, in the few individual cases where a process server's affidavit was defended at a hearing, advocates learned the difficulty of proving sewer service. The process server's self-maintained log—the chief method of detecting sewer service—rarely revealed any blatant contradictions.

In June 2008 the New York City Department of Consumer Affairs, the city agency that licenses process servers, scheduled a hearing on the problem of sewer service. In preparation, MFY Legal Services researched and published a report based on publicly available electronic reports of consumer debt cases filed in 2007 (MFY Legal Services, 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 (June 2008), http://bit.ly/9asAT7). MFY focused on 180,000 cases brought by seven debt collection law firms and found that less than 10 percent of the defendants appeared in court to defend themselves; reviewed the files of 350 of its own consumer clients and found that none had been served properly; and obtained court documents showing that judges did very little to police claims of sewer service. During a roughly one-year period, only 143 hearings were scheduled (and far fewer were likely actually held), while over 280,000 default judgments were entered. To demonstrate that sewer service is not a victimless crime, MFY recounted the hardships experienced by twelve victims of sewer service and explained why the affidavit of service related to each case was untrue.

But the true bombshell in MFY's report concerned process-server affidavits. MFY reviewed court filings in Queens, Staten Island, Brooklyn, and the Bronx and pulled ninety-one case files in Queens and Brooklyn involving three different process-service companies that worked for large consumer debt collection firms. One process-service company relied upon "nail and mail" (requiring three visits to the home) 93 percent of the time. And two of the three process-serving companies *never* personally served a defendant. On their face, the statistics suggested fraud. How could so many defendants never be at home *all of the time*? Moreover, because "nail and mail" service requires three visits to a defendant's home, it is costly. Advocates doubted that debt collection process servers were paid enough to make repeated trips to empty homes.

The Department of Consumer Affairs Holds a Hearing on Sewer Service

MFY presented its report to the Department of Consumer Affairs at its June 13, 2008, sewer-service hearing. MFY's findings were matched by revelations about process-server pay. Four process-service company executives who regularly handle debt collection accounts reported paying their process servers as little as three to six dollars per service in debt collection cases (New York City Department of Consumer Affairs, Exploratory Public Hearing on Process Server Practices in New York City 106, 137, 198 (June 13, 2008) (on file with Carolyn E. Coffey)). By contrast, owners of reputable process-service agencies paid fifty dollars for routine service or an hourly wage of $20 to $45 (*id*. at 170, 187, 173). Many reputable process-service executives refused debt collection cases because their low pay ensured sewer service (*id*. at 178, 187). Contracts between debt collection firms and process-service agencies stipulated that no payment was due unless service was successfully completed (*id*. at 138). Reputable process servers stated that this contractual condition promoted sewer service and was another reason they refused to work with debt collectors (*id*. at 130).

The hearing ended with promises by the Department of Consumer Affairs to seek a solution to sewer service. South Brooklyn Legal Services submitted written comments suggesting that the department require process servers to obtain GPS proof of their visits.

Behind the scenes, well before the June hearing, the Department of Consumer Affairs had subpoenaed the logbooks and records of 122 process servers suspected of engaging in sewer service. (Advocates later obtained over 1,500 pages of documents related to the investigation through a Freedom of Information request.) Despite meeting face-to-face with process servers, scrutinizing log books and affidavits of service, and even tailing process servers with undercover agents, the department revoked the licenses of only eleven process servers. The department's investigation thus revealed how difficult it was to prove sewer service under existing law.

The New York Attorney General Sues American Legal Process

Aware of MFY's report and other mounting evidence of rampant sewer service, the New York attorney general in April 2009 brought criminal charges against the chief executive officer of American Legal Process for widespread sewer-service fraud. The criminal prosecution was followed by a civil action (which is still pending) seeking to vacate more than 100,000 default judgments that American Legal Process obtained by using fraudulent service. Using American Legal Process' computer records, the attorney general uncovered jaw-dropping impossibilities: repeatedly the company's process servers alleged serving papers on defendants living in different counties at exactly the same time; and five of the company's process servers alleged services on a single day that, if done, would have required each to drive between 3,000 and 10,000 miles. But for the attorney general's seizure of American Legal Process' computer records, the widespread fraud could never have been uncovered. American Legal Process' bogus affidavits of service were filed in different courthouses spread across sixty-two counties, each of which contained hundreds of thousands of case files. Locating and comparing 100,000 such affidavits would have taken years.

The New York City Council Introduces the First Sewer-Service Bill

In the wake of the American Legal Process criminal indictment and seeking to amend New York City's process-server law, MFY approached Daniel Garodnick, a member of the New York City Council. MFY and others believed that low wages promoted sewer service and that any resolution had to ensure that process servers were paid and treated fairly. In 2009 the New York City Council introduced Proposed Initiative No. 1037. Its centerpiece was bonding: process-server companies and independent process servers would be required to purchase bonds ($100,000 and $10,000, respectively) from which penalties and damages could be collected when violations were committed. The bill required process-serving agencies to give their workers information about their rights as employees and the agencies' obligations as employers. The bill required the Department of Consumer Affairs to create and maintain a handbook on process servers' obligations and duties. Process-serving companies would also have to certify each year that they had conducted training for their employees regarding the laws governing process-server conduct.

At the first city council hearing on Proposed Initiative No. 1037 in November 2009, several consumer advocates testified in support of the bill and offered ways to improve it. The proposed bill allowed New York City to recoup any unpaid fines or penalties from the bond and allowed individuals who obtained judgments against servers for wrongful acts to recoup any unpaid judgments. Because the bill relied on common-law causes of action and did not specifically create a statutory right enabling an individual harmed by a process server to sue on that basis, advocates recommended a private right of action with attorney fees. A lobbyist for the process-serving industry—and the Department of Consumer Affairs—testified against the bill.

The GPS idea suggested earlier by South Brooklyn Legal Services was reintroduced, but this time with a concrete example of its feasibility. Since the summer of 2009, the New York City Department of Buildings had been using GPS devices to record the visits of its 379 inspectors to city construction sites. That policy was adopted after a construction crane collapsed, killing seven people. The crane had supposedly been inspected eleven days before, but the inspection had been faked by an inspector who was in fact miles from the site.

The Department of Consumer Affairs Backs GPS, and the *New York Times* Publicizes New Sewer-Service Lawsuit

Shortly after the New York City Council hearing, the Department of Consumer Affairs' top lawyer attended a national forum—hosted by the Federal Trade Commission—on debt collection. At the forum she heralded the use of GPS to put an end to sewer service: "It's fine to have logs; it's fine to file affidavits of service; but … it's about time for process servers to use … technology … so that we can actually track and know where the process servers [have been] when they file affidavits of service" (U.S. Federal Trade Commission, Debt Collection: Protecting Consumers 64–65 (Roundtable, Dec. 4, 2009), http://bit.ly/9Mzno7 (testimony of Marla Tepper, General Counsel, New York City Department of Consumer Affairs)).

The advocates continued to keep up the pressure. In December 2009 MFY and another advocacy group that had testified at the November hearing, the Neighborhood Economic Development Advocacy Project, filed a class action against a debt buyer, a debt collection law firm, and a process-service agency for purposefully engaging in sewer service (*Sykes v. Mel Harris*, No. 09 Civ. 8486 (S.D.N.Y. Dec. 28, 2009)). The *New York Times* reported the lawsuit and other evidence pointing to widespread fraud among debt collection process servers (Ray Rivera, *Suit Claims Fraud by New York Debt Collectors*, New York Times, Dec. 30, 2009, http://nyti.ms/clnU0T).

Revised Process-Server Bill Proves Controversial

In January 2010 the city council reintroduced the process-server bill adding a GPS provision as well as a right to sue for compensatory and punitive damages. The GPS provision was controversial even among supporters of the bill.

A number of advocates believed that GPS was an invasion of an employee's right to privacy because if the GPS device was active throughout the workday, an employer could monitor an employee's every move. Advocates feared that employers in other industries who lacked a legitimate need to know their employees' whereabouts would be emboldened by such a law. However, such concerns were allayed because process servers were already required to disclose their whereabouts in affidavits under oath and in their logbooks. Another concern was whether GPS was technologically feasible in New York City's canyons. However, the New York City Building Department's success in deploying 379 inspectors with such devices and South Brooklyn Legal Services' own experiment demonstrated that GPS worked reliably in the city.

Some also questioned whether GPS would burden honest process servers without stopping those who would engage in sewer service. After all, how could GPS stop a bad process server from driving to a defendant's home, getting GPS proof of that visit, and speeding off to the next victim without serving any papers? And how would GPS stop a bad process server from making one real service attempt and, after finding no one at home, lying that someone answered the door and was served by substitute service by the process server?

But the bill required all GPS data to be recorded in one place. A victim of sewer service could review all the alleged services performed that day. If the timelines seemed suspect and produced a large number of default judgments, a victim could use this information in a successful suit against the process server. This would likely result in the process server losing the process server's license *and* bond.

A Second *New York Times* Article, a Second Hearing, and the Bill Passes

The New York City Council scheduled another hearing on the revised bill for March 2, 2010. In preparation for the hearing, MFY and the bill's sponsor reached out to the *Times* reporter who wrote about the class action lawsuit. The title of the subsequent article made opposing the bill even more difficult (Ray Rivera, *Council Seeks to Crack Down on Process Servers Who Lie*, New York Times, Feb. 26, 2010, http://nyti.ms/bxsdCa). In contrast to the bill's first, poorly attended hearing, the hearing room for the second bill was packed to standing-room-only capacity. All the committee members were present, as was the *Times* reporter. Disgruntled process servers lined the walls. The Department of Consumer Affairs commissioner himself testified this time and championed the bill as "bold," "visionary," and "a game changer." A lobbyist for the process-server industry rankled the committee by attacking the GPS provision as "science fiction fantasy" designed to garner media attention and votes. The only real concern raised by council members was whether small-business owners and low-income process servers would be financially able to purchase bonds. That was fixed through an amendment allowing individual process servers to pay $1,000 into a fund if they were unable to purchase a $10,000 bond. The bill was enacted with an effective date of October 11, 2010.

Lessons Learned—Think Outside the Box

Attorneys often think about effecting change only through litigation. First, as in this case, incorporating anecdotal observations and primary research into a report can be far more effective. MFY's report was cited *as proof* of the sewer-service

problem that needed fixing by the New York City Council, the Department of Consumer Affairs, and the media. Indeed, a quick Google search of "MFY Justice Disserved" triggers over fifty-six hits, some of which include the Federal Trade Commission, the New York City and New York State Bar Associations, the *New York Times*, and the National Consumer Law Center. Most significant, MFY's report influenced the New York attorney general's decision to prosecute American Legal Process criminally. Without that prosecution, actual proof of systemic sewer service would never have been uncovered.

Second, if a problem has been exacerbated by technology, perhaps technology can also fix it. The huge influx in debt collection suits in New York is largely due to a creditor's ability electronically (and thus cheaply) to locate and seize bank accounts of postjudgment debtors. Advances in technology that enable easier debt collection also put GPS devices in even the cheapest cell phones. In short, technological changes may benefit both the powerful and the poor.

Third, look around. If you can analogize a private-sector problem similar to yours, perhaps a solution is already out there. The idea of getting process servers to use GPS was born in 2007 when one of us was sitting in a neighbor's new car. Subsequent research revealed that Federal Express, the U.S. Postal Service, and other employers with mobile workforces have used GPS devices for years.

Fourth, get information from public entities that are also trying to solve the same problem. By using the Freedom of Information Act, we were able to show how difficult it was for an enforcing agency to prove sewer service under existing laws. Public documents from the New York attorney general's suit similarly revealed astounding findings and hard evidence that underpaid process servers lie.

Fifth, media attention can gain interest and momentum on an issue. Advocates and the New York City Council reached out to reporters and supplied them with clients with compelling stories. By serving as experts on the problem, advocates were also able to explain to reporters the depth and cause of the problem and how to fix it.

■ ■ ■

Some of the events that transpired in the sewer-service struggle were fortuitous and timely, but the ultimate passage of this progressive legislation would not have occurred without advocates bringing the problem to the attention of the public, the media, and various governmental actors. Advocates were also responsible for aggressively pushing the bill forward. Although advocates may lack the subpoena powers of an attorney general's office and may not be able to impose fines or revoke licenses as an agency can, they can take such other measures as thinking outside the box to effect change.

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