NATIONAL ASSOCIATION OF PROFESSIONAL PROCESS SERVERS

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COMMENTS ON FTC AUGUST 5, 2009 ROUNDTABLE PROCESS SERVING

Having viewed the roundtable discussion of August 5, 2009 regarding process serving, I would make the following comments:

The purpose of the discussion was stated to be, "To compile information about how service of process is effectuated and whether consumers are actually getting adequate notice that lawsuits are being filed against them [and] the relationship between service of process and default judgments." (transcript, page 2) An additional purpose was to discuss the frequency of defaults; whether there are too many, and the costs and benefits of different ways of addressing these problems. Id.

The panel noted that service of process was being effectuated by various means: certified mail, return receipt; posting and then mailing to defendant's last known address; service by the sheriff; and, service by private process server. Transcript at 12 – 15. Panelists also noted the problems with each of these means. For example, Consumer Advocate Dave Philips pointed out that mailing "relies on the fiction that the post office is gonna deliver it, and if it's a bad address, it comes back." Mr. Philips pointed out that a newspaper testing this practice mailed one-hundred letters to one-hundred wrong addresses, with only fifty of these letters being returned by the U.S. Postal Service. Transcript at 12. Magistrate Court Judge Jeff Lipman noted that if a mailing is returned as "unclaimed" or something like that, a default judgment would probably be entered. Transcript at 13. Thus, it was clear that mailing of a summons and complaint, including posting and mailing, is not a method of service that provides substantial assurance that the defendant will actually be served with the summons and complaint. As for service of process by the sheriff, it was pointed out by Judge Susan Moiseev that sheriffs in her jurisdiction do not serve process (Transcript at 28), and collection attorney Ian Leibsker noted that he has more motions to quash service performed by the sheriff than for those serves performed by private process servers. Transcript at 21. I would also point out that, for various reasons, including the economy, Homeland Security, and insufficient manpower, more and more sheriffs' departments are getting out of the service of process business. In California alone, sheriffs in the counties of San Mateo, San Diego, Alameda, Contra Costa, Riverside, Santa Clara and El Dorado no longer serve civil process.

This leaves service of process by private process servers as the best practice.

True, there have been problems associated with such service, evidenced by the present situation in New York State where Attorney General Cuomo has uncovered what appears to be a process serving firm, American Legal Process (ALP), allegedly engaging in what is known as "gutter service". As a result, some 100,000 default judgments are in jeopardy. While the alleged unlawful service by ALP is not to be trivialized, it raises the question of whether such an unlawful practice is symptomatic of the process serving profession and, what can be done to prevent such practices in the future.

One hundred thousand default judgments is quite a large number. However, when placed in perspective, this is a very small percentage of the total number of serves perfected each year. As noted by roundtable participants Steve Lerch, Jeff Lipman, and Mike Buckles, while the number of default judgments has increased, the percentage of these judgments has not increased over the years (Transcript at 10, 11). Indeed, as pointed out by participant Mike Buckles, the percentage of default judgments has decreased over the last five years, "primarily because more answers are filed" (transcript at 10). Several participants praised the success rate of private process servers. Participant Ira Leibsker for example noted that while the sheriff has a service rate of about forty percent, private process servers actually perfect service in seventy-five to eighty percent of the sixty percent of the cases in which the sheriff is unable to perfect service. There can be no doubt but that service by private process servers is the most effective means of insuring defendants, including those being served for consumer debts, are properly noticed that a suit is pending.

However, a problem has been identified, that being that there are process servers who, for monetary reasons, lack of knowledge of the law or other reasons, fail to properly serve summons and complaints and falsify affidavits of service. That this involves a small percentage of the total number of cases that result in default judgments does not warrant that we disregard the problem. The issue then is how can this problem of improper service be solved?

Consumer protection attorney Ian Lyngklip and consumer-rights attorney Pete Barry suggested that the exemption for process servers be removed from the FDCPA (Transcript 20, 21 and 36). However, participants Bob Markoff and general counsel Rozanne Anderson could foresee problems with this approach (Transcript 27, 36, 38). Several problems immediately present themselves with this approach. Frequently, process servers contact neighbors to determine if the

address provided for service is valid or if the consumer/defendant has moved, etc. This might very well violate §804 (3) and (6) and §805 (b). Process servers also utilize the services of third-party information providers such as Lexis to locate a defendant. This too could be considered a violation of the FDCPA. Must a process server cease attempting to serve process on a consumer if the consumer demands the process server cease and desist? §805(c) and (d). The normal activities of a process server could be deemed to violate §806, in that the act of serving process may be argued to constitute harassment, etc. Process servers frequently use false information to serve process on one who evades service. This would be deemed to violate §807. Actions by process servers to serve one who is evading process might also be considered to violate §808 by using "unfair" or "unconscionable" means to perfect service. Will a process server be required to give the notice requirement of §809? Process servers often leave notices when the debtor is not found at home, suggesting that a delivery of a package for example was attempted. The notice provides a phone number for the debtor to call to arrange for delivery when the debtor will be available to accept. This would presumably violate §812. Section 805(a)(1) may result in litigation because process may be served before 8:00 a.m. or after 9:00 p.m. or at a place deemed "inconvenient" for the consumer. Would service violate §805(a)(3) if attempted at the consumer's place of employment? Would service on Sunday or on a holiday be considered a violation?

Before removing the process server exemption, one should beware of the law of unintended consequences. And, the consequences will be substantial. Collection attorneys would have to provide the process server with substantial and explicit instructions as to what actions the process server could take to effect process. In spite of this, actions by process servers would result in a substantial increase in litigation. It seems clear then that to remove the process server exemption, substantial modifications of the law would be required to allow process servers to use all reasonable means to serve defendants under various circumstances. But, if the FDCPA is so modified, process servers would then be allowed to serve process as they do now, pursuant to Rule 4 of the Federal Rules of Civil Procedure and various state laws of civil procedure. It would appear that removing the process server exemption may not be a viable option.

Associate Director Joel Winston asked, "Are there best practices out there in the industry that we should be looking at as models? How are the state laws and the courts and the industry's self –regulatory efforts been addressing these concerns

in ways that we can learn from?" Transcript at 3. The answer is that there are best practices, but they are not always practiced.

The National Association of Professional Process Servers (NAPPS), represents more than 2,000 process servers in the United States, Canada, Europe and other countries. We are a member of the International Association of Hussiers de Justice, a civilian member of the United Nations. Additionally, we are presently working closely with the National Sheriffs' Association in an attempt to improve the quality of process service throughout the United States. NAPPS has thus far chartered nine state process serving associations that meet the requirements established by NAPPS that they have a training program for process servers in their respective states and adhere to the best practices established by NAPPS. In addition to the best practices, NAPPS, as well as the state chartered associations, maintain a code of ethics that its member must adhere to. Failure to abide by the best practices and codes of ethics can result in revocation of membership. So, those seeking a process server who can be relied upon to properly serve a summons and complaint, subpoena or other legal document would be well advised to procure the services of a member of one of these professional associations.

Admittedly however, not all process servers are members of one or more of these associations. Those that are not cannot be forced to adhere to the standards required of members. However, some of these state associations, with the assistance of NAPPS, have promoted legislation in their respective states that includes certification of process servers who have completed a training program and passed an examination demonstrating their knowledge of the laws and rules regarding service of process. States that have adopted such legislation include Arizona and Texas. Failure of a process server to maintain his/her certification through annual continuing education requirements results in the revocation of the certification. In Georgia, similar legislation promoted by the Georgia Association of Professional Process Servers has passed the Georgia House and is expected to pass the Georgia Senate during the 2010 legislative session and become effective July 1, 2010. California requires that process servers be registered. In California, the California Association of Legal Support Professionals provides continuing education not just to its members, but to all process servers throughout California who desire to become certified by that Association. The Florida Association of Professional Process Servers also has a legislative and training program. The New York State Professional Process

Servers Association presently provides a continuing education training program leading to certification by the Association. However, New York has no legislation requiring process servers to obtain certification and maintain that certification through continuing education.

It seems to me that participant Rozanne Andersen concisely summarized a major problem in noting that "we are hearing that there's tremendous differences from . . . state to state . . .. It is difficult to put together best practices for service-of-process issues because of so many variations and [it is] difficult to find a uniform solution. [In] some states' process servers are licensed, other states, they're not [and] there are no best practices at all . . . ." (Transcript at 26).

I agree with participant Andersen that, "**[P]erhaps this is a perfect opportunity . . . to either drive initiatives or help the community understand what needs to be done**." (Id.) This is the time to encourage state legislatures to enact certification laws for process servers. Certification laws that will require continuing education and the passage of tests that insure that private process servers are knowledgeable of the that state's service of process laws. NAPPS and its chartered state associations are ready to assist in this endeavor. The FTC can lend its considerable influence in this regard. Why not pursue meetings with key legislators of the states to discuss this issue and how they can assist with the solution. A model statute can be offered that states can use as a foundation upon which to mold rules that can work for each respective state. In this way, we can insure that private process servers throughout the country are qualified to serve process, whether that process involves domestic relations, torts, or consumer debt.

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