

PROPOSED LEGISLATION

THE PETITIONER

The petitioner of this proposed legislative change is Arizona Association of Certified Process Servers, a non-profit organization representing Arizona certified process servers statewide.

LEGISLATION AFFECTED

The legislation affected by the proposed changes herein is A.R.S. § 11-445 at I.

BACKGROUND AND DISCUSSION

The authority of the certified process server is established in A.R.S. § 11-445 I.

The certified process server is designated “an officer of the court” in A. R. S. § 11-445 I, which reads in pertinent part, “[A] private process server is an officer of the court.”

Regulation of certified process servers is vested in the Supreme Court Licensing and Regulation Division.

Certification and administration of process servers is vested in the Superior Court, specifically the Superior Court in the county in which the certified process server resides.

Certified process servers undergo a criminal background investigation as required in A.R.S. § 11-445 I, which reads in pertinent part, “[A]s a condition of registration, the Supreme Court shall require each private process server applicant to furnish a full set of fingerprints to enable a criminal background investigation to be conducted to determine suitability of the applicant.”

Certified process servers undergo examination prior to certification as required in the Arizona Code of Judicial Administration § 7-204 at E. Initial Certification 3. Examination, which reads in pertinent part, “[E]ach applicant for certification or renewal shall personally take and pass the examination provided by the director and administered and scored by the clerk of the superior court.”

Certified process servers must undergo ten hours of continuing education per year of certification as required in the Arizona Code of Judicial Administration § 7-204 at F. Role and Responsibilities of Certificate Holders. 7. Continuing Education, which reads in pertinent part, “[C]ertified private process servers shall complete ten hours of continuing education each twelve months...”.

Certified process servers renew their certifications every three years, and a criminal background investigation is accompanied by a fingerprint card submission for both a state and federal criminal records check.

Certified process servers serve most of the process in the State of Arizona, being authorized in A.R.S. § 11-445 I to serve nearly all manner of process. A.R.S. § 11-445 I reads in pertinent part, “[P]rivate process servers duly appointed or registered pursuant to rules established by the supreme court may serve all process, writs, orders, pleadings, or papers required or permitted by law to be served before, during, or independently of a court action...”

Personal service of process is the optimum form of notification to parties and whenever possible is sought and is at times required; obstacles that serve to frustrate or defeat service of process should be removed to the greatest extent practicable.

Service of process is an instrumental element of our judicial system, and our judicial system and the public depend upon timely service of process.

As noted in Star [infra] by the Honorable Rudolph J. Gerber, frustrating, avoiding, and defeating the service of process constitutes interference with judicial proceedings (A.R.S. § 13-2810) and contempt of court (A.R.S. § 13-3802).

Certified process servers who are acting within their capacity of officers of the court and who are attempting to serve process are frequently instructed by law enforcers to leave real property and not return or be subject to arrest for criminal trespass, as there is currently no black and white statute that provides for the requisite authority and privilege for the certified process server to enter and remain upon real property while engaged in the performance of attempting to serve process and serving process.

Certified process servers who are acting within their capacity of officers of the court are barred from entry into many planned community properties, thus creating virtual no-serve zones that wrongfully insulate parties from personal service of process, frustrate service of process, defeat service of process, and create a need for the public to seek alternative methods of service of their process through the courts by way of Motions for Alternative Methods of Service, which are costly and time-consuming.

Proscribing unannounced entry to real property by certified process servers negates the problem of frustrated or defeated service of process upon parties who practice avoidance of service of process following notification by guards, managers, or others controlling community entry.

Granting certified process servers the authority and privilege to enter and remain upon real property for the purpose of attempting service of process and service of process is in the public interest, and conversely denying certified process servers the authority and privilege to enter and remain upon real property for the purpose of attempting service of process and service of process is contrary to the public interest.

PURPOSE AND INTENT OF PROPOSED LEGISLATION

It is the purpose and intent of this proposed legislation to provide clarity to certified process servers, law enforcers, the courts, and the public regarding the authority and privilege of certified process servers to enter and remain upon real property for the purpose of attempting to serve process and serving process. It is also the purpose and intent of this proposed legislation to improve the efficiency of certified process servers and provide an improved opportunity for parties to be personally served with process and at the same time reduce the incidence of the courts having to consider Motions for Alternative Methods of Service of Process in instances where the current statutes force such costly and time-consuming actions.

IMPACT UPON STATE FUNDS AND ARIZONA TAXPAYERS

The proposed revision of A.R.S. § 11-445 I. shall have no negative impact whatsoever upon state funds nor shall the proposed revision have a negative impact upon Arizona taxpayers, as it seeks neither funding nor tax relief of any sort.

IMPACT UPON THE PUBLIC, LAW ENFORCERS, AND THE COURTS

The proposed legislation aids the public by:

- a. enhancing the opportunity for personal service of process, which is the optimum mode of notification, and
- b. reducing the need for plaintiffs to incur additional costs and expenses associated with motions for alternative methods of service of process, and
- c. reducing the time needed to serve process and thus commence actions.

The proposed legislation aids law enforcers by:

- a. clarifying in black and white the scope and extent of the authority and privilege of the certified process server to enter and remain on real property as attempting to serve process and serving process, and
- b. negating an adversarial encounter between the certified process server and the law enforcer regarding criminal trespass violations, and
- c. reducing the responding law enforcer's time in negotiating complaints of criminal trespass allegedly committed by the certified process server.

The proposed legislation aids the courts by:

- a. not having to consider the current volume of Motions for Alternative Methods of Service of Process and thus avoiding the inherent costs thereof, and
- b. reducing the incidence of successful avoidance of service of legal process, and
- c. having actions commenced more timely via more timely service of process.

OTHER STATES' LEGISLATIVE APPROACHES

It is noted that most other states do not have a certified process server program like that in Arizona. Arizona has one of the most evolved and sophisticated certified process server programs in the United States.

Other states that do have process server programs have encountered similar problems in the absence of appropriate legislation regarding the authority and privilege of process servers to enter and remain upon real property for the purpose of service of process and have successfully addressed their respective issues legislatively as follows:

- a. Illinois: The State of Illinois in 2011 revised its criminal trespassing statute Section 5. Criminal Code Sec. 21.3 (i), which now reads in pertinent part,

- (i) “[T]his section does not apply to the following persons while serving process:

- (1) “a person authorized to serve process...”

- (2) a special process server appointed by the circuit court.”

- b. Washington: The State of Washington in 2011 created an affirmative defense, which reads in pertinent part,

“[I]n any prosecution under RCW 9A.52.070 and 9A.52.080, it is defense that:

The actor was attempting to serve legal process which includes any document required or allowed to be served upon persons or property, by any statute, rule, ordinance, regulation, or court order, excluding delivery by the mails of the United States. This defense applies only if the actor did not enter into a private residence or other building not open to the public and the entry onto the premises was reasonable and necessary for service of the legal process.”

- c. California: The State of California revised California Code Article 3. to read in pertinent part,

“[A]rticle 3. Manner Of Service Of Summons:

415.21. (a) Notwithstanding any other provision of law, any person shall be granted access to a gated community for a reasonable period of time for the purpose of performing lawful service of process or service of a subpoena, upon identifying to the guard the person or persons to be served, and upon displaying a current driver’s license or other identification.”

- d. Georgia: The State of Georgia in 2011 passed legislation as O.S.GA. 9-11 F., which reads in pertinent part,

4. “[S]ervice upon persons residing in gated and secured communities.

(A) As used in this paragraph, the term “gated and secured communities” means multiple residential or commercial properties, such as houses, condominiums, offices, or apartments, where access to the multiple residential or commercial properties is restricted by a gate, security device, or security attendant that restricts public entrance onto the property; provided, however, that a single residence, farm, or commercial property with its own fence or gate shall not be included in this definition.

(B) Any person authorized to serve process shall be granted access to gated and secured communities for a reasonable period of time during reasonable hours for the purpose of performing lawful service of process upon:

(i) Identifying to the guard or managing agent the person, persons, entity, or entities to be served;

(ii) Displaying a current driver’s license or other government issued identification which contains a photograph; and

(iii) Displaying evidence of current appointment as a process server pursuant to this Code section.

(C) Any person authorized to serve process shall promptly leave gated and secured communities upon perfecting service of process or upon a determination that process cannot be effected at that time.”

e. Florida: The State of Florida in 2011 passed legislation as 48.031, which reads in pertinent part,

48.031 “[S]ervice of process generally.

A gated residential community, including a condominium association or a cooperative, shall grant unannounced entry into the community, including its common areas and common elements, to a person who is attempting to serve process on a defendant or witness who resides within or is known to be within the community.”

f. Nevada: The State of Nevada passed legislation as N.R.S. 14.090, which reads in pertinent part,

NRS 14.090 “[S]ervice of process at residence assessable only through gate.

1. A person who resides at a location to which access is not reasonably available except through a gate may be lawfully served with any legal process in the manner provided in this section. If there is:

(a) A guard posted at the gate and the guard denies access to the residence for service of process, service of process is effective upon leaving a copy thereof with the guard.”

g. Michigan: The State of Michigan in 2014 passed legislation amending the Michigan Penal Code as Public Act 230, which reads in pertinent part,

PA 230: The Trespassing prohibition and penalties do not apply to the process server who is on the land or premises of another while attempting to serve process.

CASE LAW IN ARIZONA

The most compelling case law in Arizona is found in State of Arizona vs. Douglas B. Star, No: LC 87-000135. The court in Star reversed the lower court decision that convicted Mr. Star, who was then a private process server “licensed” by the Superior Court in Maricopa County, of criminal trespass as he attempted to serve process.

In his ruling, The Honorable Judge Rudolph J. Gerber wrote in pertinent part, “[A]t all times in question, Mr. Star was a process server “licensed” by the Superior Court of Maricopa County to serve process. Accordingly, his presence on Mr. Berry’s property was “authorized” by the Court to the extent necessary to serve process. His presence on the property was also “privileged” just as much as a police officer, fireman, mail carrier, or similar official. A process server is an arm of the court statutorily analogous to a sheriff. A process server in serving process has the same obligations and rights as a sheriff. See A.R.S. 11-445.”

Judge Gerber continued, “[I]n the course of his official duties and to the extent required to serve process, a process server is implicitly analogous to a police officer, fireman, mail carrier, and explicitly analogous to a sheriff and has authority delegated directly by the Court, specifically in this case by the Superior Court, to enter private property to the extent necessary to serve court documents. This right is not changed by posting or signing property, fencing, having a guard, or issuing a verbal command to leave property. Were it otherwise, an obstructive private property owner could force court proceedings to grind to a halt merely by refusing access to a process server so as to insulate himself from court proceedings. Such a bizarre result would paralyze the courts. Such behavior is not permitted by any of the applicable statutes dealing with process servers.”

PROPOSED STATUTORY REVISION

The proposed statutory revision to A.R.S. § 11-445 I. shall add wording as follows in bold type:

[A] private process server is an officer of the court. **In the performance of attempting to serve or while serving process, a duly appointed or Certified Process Server is authorized and privileged to enter and remain lawfully;**

1. On Real Property.

2. Unannounced in a planned community or condominium association that is guarded or gated.