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July 30, 2013

By Fax (770-914-1179) and U.S. Mail

J. Terry Norris, Executive Director
Georgia Sheriffs' Association
3000 Highway 42 N.
P.O. Box 1000
Stockbridge, Ga. 30281

Re: O.C.G.A. §9-11-4.1: Certified Process Servers

Dear Mr. Norris:

This law firm has been retained by the Georgia Association of Professional Process Servers ("GAPPS") concerning the operation of O.C.G.A. §9-11-4.1 as seemingly universally interpreted and applied by 158 of 159 Sheriffs in Georgia.

Section 9-11-4.1 was enacted by the General Assembly in 2010. It provides a means for certifying individuals to act as private process servers. The obvious purpose of the legislation was to address the reality that, all too often, busy Sheriff's Departments are unable to promptly serve civil process---and to provide an alternative, privately funded, mechanism for achieving timely service of process.

It has come to our attention that 158 of the 159 Georgia Sheriffs are refusing to allow certified process servers to serve process in their "home" counties, taking the position, apparently, that they have complete, unbridled discretion to simply "refuse" to cooperate with the statutory scheme. We believe that such a blanket "rule" constitutes a gross abuse of discretion, and operates to deprive our clients of due process of law.

The objective qualifications for certification as a process server are set forth in §9-11-4.1(b)(1)(A)-(E). They include the following: criminal background check showing no conviction of a felony or impersonating a peace officer; completion of a 12 hour course of instruction; successfully passing a test administered by the Administrative Office of the Courts; surety bond; and U.S. citizenship. Pursuant to §9-11-4.1(a), absent "good cause", all persons satisfying these criteria are legally entitled to certification.

We are aware that another provision of §9-11-4.1(a) purports to vest discretion in the Sheriff to decide whether or not to permit certified process servers to actually serve process within their "home" counties.[1] A blanket rule unofficially adopted by 158 of 159 Georgia Sheriffs refusing to allow service of process by certified process servers within "their" counties, however, plainly amounts to a gross abuse of discretion violating due process, redressable via Mandamus.

In Pryor Organization, Inc. v Stewart, 274 Ga. 487 (2001), the newly elected Sheriff of Spalding County refused to permit the Plaintiff to continue to write bonds within the County, and he sought a writ of Mandamus to compel the Sheriff to do so. The Supreme Court observed as follows:

> The Sheriff's discretion is not absolute, but is circumscribed by the statutes from which his authority derives. [cit] O.C.G.A. §17-6-50 establishes the qualifications of "professional bondspersons". *If Pryor met those statewide qualifications, then the refusal to permit it to conduct business at the county level cannot be upheld. The Sheriff's decision, under those circumstances, would be "without legal justification or excuse,...arbitrary, illegal and capricious and an abuse of discretion."*

The situation hypothesized by Justice Carley is precisely what is presented by the Sheriffs' blanket rule barring certified process servers from plying their trade in the Sheriffs' "home" counties. Section 9-11-4.1 sets out a specific listing of the objective criteria required to become certified as a process server. With those requirements as a backdrop, Sheriffs simply are not free to adopt a blanket rule banning all such service.

Notwithstanding the "provided the sheriff of the county for which process is to be served allows such servers" language, due process necessitates far more than mere fiat—it requires the Sheriff to formulate and adopt specific criteria by which to determine which persons will and will not be permitted to serve process. A number of cases in other analogous circumstances make the point clear.

For example, in Arras v. Herrin, 255 Ga. 11 (1985), the Plaintiff sought a license to sell alcoholic beverages, and plainly satisfied all of the objective requirements called for by the local ordinance.

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[1] Sec. 9-11-4.1(a) provides that certified process servers "shall be entitled to serve in such capacity for any court of the state, anywhere in the state, *provided the sheriff of the county for which process is to be served allows such servers to serve process in such county."*

The County Commission, however, denied license, relying on a provision of a local ordinance which purported to vest in it absolute discretion to approve or disapprove the license. After the trial court denied the resulting Petition for Mandamus, the Supreme Court reversed and ruled that such action contravened due process:

> Due process constraints dictate that the Camden County Commissioners may not deny Arras a license...by exercising the "absolute discretion" provided in Section 11-102(7). Local municipal governing authorities may no longer deny liquor licenses without justification merely by labeling an alcoholic beverage license a "privilege" and not a "right." [cit] While states and local governments have the right to regulate sales of intoxicating beverages as a valid exercise of police powers, the power to regulate the activity does not exempt the state from the operation of the 14th Amendment. [cit] Absolute and uncontrolled discretion by governing authorities to issue licenses invites abuse, and exercise of discretion by states and local governments must be tempered with "ascertainable standards ... by which an applicant can intelligently seek to qualify for a license...." [cit] Thus, in Georgia a liquor licensing ordinance must provide "sufficient standards to control the discretion of the governing authority and adequate notice to applicants of the criteria for issuance of a license." [cit]
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> The ordinance in question contained objective standards regarding the location of the business where the license is to be exercised, and it is without dispute that Arras met these objective standards. Instead of relying on these standards, the Board based its denial on the vague language of section 11-102(7) which confers an "absolute discretion" on the Board to make a "final" determination as to whether the location is "proper" and in the "best welfare" and "best interests" of Camden County. These words contain no standard to control the discretion of the Board and thereby deny due process.

The right to become certified as a private process server—upon satisfaction of the specified objective requirements—serves no purpose whatever if Sheriffs are permitted to ban them from actually serving process. The Legislature plainly could not have intended such an absurd result.

Numerous other decisions confirm this elementary rule. In Fulton County v. Bartendfeld, 258 Ga. 766 (1988), the Plaintiff sought a special use permit to create solid-fill landfill. As in Arras, he met all of the objective criteria specified in the local ordinance. Relying on Arras, the Court held that:

> [S]ince the applicant here has complied with all objective conditions and prerequisites set out in the local zoning ordinance for obtaining issuance of the permit, and since the board of commissioners' denial thereof constitutes an act of discretion which is lacking in any articulable, objective ground of support, the appellee has a clear legal right to issuance of the permit, thereby entitling applicant to issuance of the writ commanding grant of the application by the local authorities.

See also Crymes v. DeKalb County, 258 Ga. 30, 364 S.E.2d 852 (1988)(Plaintiff entitled to special use permit where all objective requirements satisfied).

Also relating to the Sheriffs' "blanket rule", in Ga. Dept. Of Trans. v Peach Hill Properties Inc., 278 Ga. 198 (2004), the Plaintiff sought to develop land into a solid waste facility. Because the land was within 6 miles of an airport, FAA regulations required application for an exemption from the pertinent state agency (DOT). DOT adopted a blanket rule that it would not seek such exemptions under any circumstances. The Supreme Court ruled that such a blanket rule was impermissible:

> With regard to the situs of landfills, the federal aviation regulatory scheme vests state aviation agencies with discretion as to whether to request a municipal solid waste landfill exemption from the FAA. See 49 U.S.C. § 44718(d) (2003); FAA Advisory Circular 150/5200-34.FN3 In order to exercise that discretion, it is incumbent upon state aviation agencies to develop ascertainable standards to gauge whether landfill operators qualify for an exemption request.

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> In this case, DOT has given no guidelines to landfill operators as to how to qualify for an exemption. Instead, DOT enacted a blanket policy refusing to seek any exemptions from the FAA on the part of landfill operators. *This, DOT could not do. It could not close its eyes to the landfill exemption process. It was required to establish objective guidelines enabling it to determine whether to request an exemption in any given case.*

In this case, the Legislature has already promulgated the objective requirements necessary to achieve certification. Where those requirements are satisfied, there is no discretion for the Sheriff to exercise.

In light of these authorities, the concerted action of 158 Georgia Sheriffs to deny qualified and certified process servers their ability to make a living plainly violates due process. Our clients hope that this situation may be resolved by agreement. Nonetheless, if an agreement cannot be reached by August 15, there will be no choice but to file a class action Mandamus Petition/Petition For Declaratory Judgment naming a " Defendant Class" of all current Georgia Sheriffs, as well as the Georgia Sheriffs' Association.[2] Given the obvious purpose of §9-11-4.1, hopefully, this will not be necessary.

Very truly yours,

A. Lee Parks

ALP/kt
cc: *Via Email*:
Deborah A. Duchon, President
Ga. Assn. of Professional Process Servers
Harlan S. Miller, Esq. (via email)

[2]As you know, the Sheriffs' Association plays a prominent role in the operation of Section 9-11-4.1. Indeed, the GSA receives $30 of each $80 application fee submitted by candidates for certification.