

Itinerant Vendor Regulation—Or, Upsetting the Apple Cart?

By David Wesner

In my municipality, every so often the issue of itinerant vendors comes up. And, with that issue comes the discussion of elimination versus regulation. Of course, as with any issue, we have proponents on either side. Those who propose elimination favor the local vendor who has a permanent brick-and-mortar location and sells the same type of items. Those business owners have made a significant investment in the community and we shouldn't allow someone to roll through town on a weekend, or for some other limited time period, and take business away from them. Those who propose regulation believe competition is good and those who come in only for a day or two, or other short time period, are not going to make a significant impact on local, permanent business owners.

Typically, the issue comes to me by way of someone desiring to come to town to sell tools or some similar items. However, the one local vendor who always enters the discussion is a food vendor. He used to own a restaurant and operate his mobile food truck based from that location. However, when his restaurant burned down, he continued to operate his mobile food truck. In the last couple of years, I have seen stories about how municipalities were looking to eliminate mobile food vendors for a myriad of reasons, including aesthetics. Recently, mobile food vendors seem to be making a comeback. They contend that they are a part of American heritage and are convincing municipalities that they provide a service to the community and should be allowed to operate.

Our ordinance in Danville, Illinois, defines Itinerant Vendor as: "Any person who transports tangible personal property for retail sale within the city other than from a fixed location and who does not maintain in the city an established store, office, distribution house, sale house, warehouse service center, or permitted residence from which such business can be conducted." This definition encompasses everything from Velvet Elvis paintings to hot dogs that could be sold on a street corner. We do not have a separate ordinance regulating mobile food vendors. As such, they would be included within the definition of itinerant vendor and regulated as such (this would include my local mobile food vendor due to his lack of a permanent location).

On its face, our ordinance cannot be said to fall within the "elimination" category. However, the requirements we have in place for an individual to operate as an itinerant vendor come pretty close to that result. The ordinance requires that anyone desiring to operate as an itinerant vendor within the city apply for a license and pay $100 per month for such license. The individual must also supply a copy of his certificate of registration under the Retailer's Occupation Tax Act. As much of a burden as those items may pose, the biggest hurdle comes from the Zoning Code. Under our Code, an itinerant vendor (or transient merchant) may only operate in a location zoned for general business and only after obtaining a special use permit. As we all know, the process to obtain a special use permit is not a short one, and comes with its own costs. Consequently, potential vendors who desire to come to town for only a short time will likely not want to run the gamut of these procedures and costs (especially if they are then limited to only certain locations from which to operate).

To date, my municipality has not discussed relaxing the current ordinance or providing separate regulations for mobile food vendors. However, if we were to begin those discussions, one regulation that would be worth considering is a limitation on the number of permits or licenses to be made available to these types of vendors, similar to liquor licenses. A limitation on the number of permits or licenses would prevent any concern for proliferation within the community. Another regulation to review would be the limitation on locations within the community. Currently, as noted above, these vendors can only operate in a general business zoning district. If we look to relax location-based regulations, one potential benefit might be that mobile food vendors could locate near industry that otherwise doesn't have food options, reducing the need for employees to travel a great distance for meals.

I see myself as siding with regulation versus elimination. I don't know that excluding or eliminating certain types of business is necessarily a good thing (although I suppose it could depend on the nature and extent of the business). But I do believe in reasonable and fair regulation that takes into consideration the impact on the community. And, for this issue, I would want to be cognizant of those businesses who have made a significant investment in the community through their brick-and-mortar establishments.

As I was preparing this column, IMLA's Code Enforcement group was discussing this very topic, specifically

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information at risk of disclosure.

Two concluding points: (1) Rules of professional responsibility usually permit disclosure of confidential information to the extent "necessary" to comply with law or court orders, but obligate the attorney to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure."[5] Does this obligate us to try to oppose claw back arrangements, so that disclosure of confidential information would not be rendered "necessary"? Unfortunately, in today's climate, in all but the smallest cases such attempt likely would risk sanctions for frivolous motions. (2) Some state freedom of information laws, at least as interpreted by state attorneys general, either provide no protection for attorney-client privilege[6] or impose waiver of attorney-client privileges from disclosure through mere negligent failure to assert privileges within specified time limits[7] as distinguished from waiver by intentional relinquishment of a known right, the usual standard for waiver of rights in most contexts.[8]

Client confidentiality is sacrificed, rightly or wrongly, to other concerns in these two additional instances.

We owe our clients an accurate update on what should be their realistic confidentiality expectations when communicating with their lawyers and in putting information on government platforms – even if this might deter some valuable communication with legal counsel.

Notes

1. *See* ABA Model Rules Prof'l Conduct 1.6(b)(6) (disclosure of confidential client information authorized "to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order").
2. *See, e.g.,* Fed. R. Civ. P. 26(b)(5)(B); Fed. R. Evid. 502(b).
3. To get court enforcement of a claw back agreement in litigation, most rules require that the disclosing party used reasonable measures in trying to protect against disclosure of privileged files. *See, e.g.*, Fed. R. Evid. 502(b)(2). That consideration is reason enough to incur the time and expense of at least some review before relying on the claw-back. I have seen parties "stipulate" to each other's due diligence. They are gambling that the court will not care. Often that gamble will pay off; sometimes not.
4. *See* US [magistrate] judge says clawback pact atones for all discovery sins, attorney-vendor errors included ACEDS, http://www.aceds.org/us-judge says-clawback-pact-atones-for-all-discovery-sins-attorney-vendor-errors-included/ (last visited Feb. 18, 2013), discussing Discovery Order, Brookfield Asset Mgmt., Inc. v. AIG Fin. Products Corp., No. 09 Civ. 8285(PGG), 2013 WL 142503 (S.D.N.Y. Jan. 7, 2013).
5. *See* ABA Model Rules Prof'l Conduct1.6(b)(6) and (c).
6. *See, e.g.*, Paul R. Rice with Anthony J. Mormino, 1 Attorney-Client Privilege: State Law Arkansas § 8:27 (accessed on Westlaw Next Feb. 18, 2013), construing Ark. Code Ann. § 25-19-105 (1987). ML

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concerning mobile food vendors. I was unable to participate in the teleconference, but I am sure there was lively discussion.

One of the items coming from the teleconference and discussion was a sample ordinance sent by Karen Blake Beyke. The sample ordinance came by way of Joseph Deeb, who wrote a paper for IMLA's Code Enforcement Conference in Austin, Texas on the topic of mobile food truck vendors. Karen sought comments from the group in looking to finalize a model ordinance to be used as a resource for municipalities looking to regulate these vendors. I would encourage everyone involved in code enforcement to contact IMLA or Karen to become a part of the group. Karen does a wonderful job leading the group and provides great connections and resources. One of the best things about IMLA is the ability to connect with other attorneys facing the same issues and avail yourself of the resources IMLA can provide to assist you, including model ordinances.

Whether you believe in elimination or regulation, IMLA's resources would be beneficial to you as you decide on whether to "upset the apple cart." ML

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