

CENTER FOR APPELLATE LITIGATION

120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535

<http://appellate-litigation.org/>

ISSUES TO DEVELOP AT TRIAL

December 2017 - Vol. 2, Issue 11

Exceptions and provisos, provisos and exceptions, what's a well-meaning lawyer to do? It sounds like the beginning of a show tune. But it's really the key to the successful challenge to the misdemeanor charge of Unlicensed General Vending under the N.Y.C. Administrative Code that we discuss in this month's newsletter. Misdemeanor charges may carry less serious penalties, but they still have consequences. They give your clients a record and require potentially numerous, and always burdensome, appearances in court. Plus, their collateral consequences might impact such crucial matters as your client's immigration status. Yet, misdemeanor accusatory instruments are typically poorly or carelessly drafted and would not sustain a timely motion to dismiss for failing to set forth non-hearsay allegations to support every element of the charged offense.

This month, like last, we focus on another common misdemeanor charge – this time, Unlicensed General Vending under the N.Y.C. Administrative Code — and propose a challenge for you to bring. In this issue, we also make an appeal for your support for a very special CAL project.

- **If your client is charged with Unlicensed General Vending, consider whether the items they vended are protected under the First Amendment, and, if an argument could be made, move to dismiss the accusatory instrument if the “exception” is not pleaded.**

The Law: Administrative Code § 20-453 prohibits Unlicensed General Vending thusly:

It shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter, except that it shall be lawful for a general vendor who who hawks, peddles, sells, or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefor.

(emphasis added).

The underlined language is the key. Since the exception to the general rule is contained within the statute itself, it is an “exception,” not a “proviso” (the latter being an exception found outside the statute), and, as such, is treated as an essential element that the prosecution must both allege and prove. See People v. Kohut, 30 N.Y.2d 183, 187 (1972).

What is more, the exception – meant to protect free speech — covers not just the identified items (newspapers, periodicals, etc.), but also “other similar written matter.” And more to the point, the phrase “written matter” has been interpreted as excepting various forms of speech from the licensing requirement, regardless of whether that speech is functionally equivalent to a newspaper or the other enumerated items. See Bery v. City of N.Y., 97 F.3d 689, 694 (2d Cir. 1996). Accordingly, the Department of Consumer Affairs, the city agency tasked with enforcing section 20-453, has issued a guidance letter that extends the “written matters” exception to “items bearing political messages,” including “t-shirts, buttons and flags.” We’ve attached the DCA letter to this newsletter and invite you to use it in making the challenges we suggest in our Practice Tips below. But even that list is non-exhaustive: if what your client is vending can be said to have “the ability to communicate in a manner that contributes to or generates the exchange of ideas,” People v. Shapiro, 139 Misc.2d 344, 346-47 (N.Y. Cnty. Crim. Cto. 1988), you can argue that his vending is within the exception and triggers constitutional protection.

Practice tips:

- If your client is charged with Unlicensed General Vending, consider whether what he sold could, under any theory, be considered expressive and thus protected by the statutory exception.
- If the accusatory instrument fails to plead the exception, move to dismiss it on the grounds of facial insufficiency for the prosecution’s failure to plead the exception.
- Although it is unlikely the prosecutor will bother amending the instrument in response to your challenge, you can forego the challenge if you have reason to believe he or she might, and instead file a notice of appeal at the end of the case. *A facially insufficient misdemeanor complaint/information is jurisdictionally defective and can be raised on appeal even absent preservation. But we can’t raise the challenge unless you file a timely notice of appeal.*
- If the court denies your challenge and the case proceeds to trial, specifically challenge the prosecution’s failure to prove that your client was not exempt from the ordinance on your motion to dismiss at the close of the People’s case.

Happy holidays and happy challenging!

Keep reading for a special message from CAL!

BOOKS BEYOND BARS- A SPECIAL CAL PROJECT

Through the **Books Beyond Bars Project**, begun by the Center for Appellate Litigation in November 2016, CAL lawyers are able to send their clients books, magazines, and any other reading materials they request. Since prison libraries are usually understocked or filled with outdated books, we do our best to provide our clients with materials we know they want to read. We hope that reading helps them get through the isolation of the criminal justice system while encouraging self-empowerment and personal growth.

But we need your help! Books Beyond Bars is entirely funded by donations from staff and friends of CAL. So far, we have been able to send literature to hundreds of clients. However, we are often unable to fulfill our clients' specific requests, leading to many waiting for months or never receiving the books they wanted.

With your generosity, we will be properly equipped to buy our clients the books, magazines, and other literary works they request. The funds will go toward paying for books, magazines, etc. and the costs of mailing those materials. Through donating, you will directly contribute to the education and well-being of our clients. Many have previously expressed their gratitude in letters to advocates at CAL:

"I appreciate you sending me the four books, thank you so very much! It's funny how I got the books on my birthday."

"Oh my God! 'Writing my Wrongs' was so powerful."

"There's times that I don't want to stop reading and I have to force myself to stop."

"I'm so grateful and so far it's a good book—if you have more I will appreciate it so much!!"

"I see you were able to acquire 'Just Mercy' by Mr. Bryan Stevenson. This book... really helps me make light of my situation and put the nation's mass incarceration problem in perspective."

Please help us continue this amazing project! A contribution of any amount would be deeply appreciated! Please follow the link below, choose a "team" member, and whatever amount you are able to give:

<https://www.crowdrise.com/o/en/campaign/books-beyond-bars-monday-team>

Thank you from CAL.



January 21, 2005

The New York City
Department of
Consumer Affairs
42 Broadway
New York, NY
10004-1716

Re: Vending Inquiry

Gretchen Dykstra
Commissioner

Dear Sir/ Madam:

This is in response to your inquiry about vending and whether a General Vendors license is required for what you wish to sell on the streets of the City of New York. See the lists below for examples of what would or would not require a General Vendors license.

Non-Exempt Materials -- A General Vendors License Is Required

◆ *The Sale of "Crafts and Other Merchandise":*

- Crafts/e.g. figurines
- Incense
- Perfume and Oils
- Jewelry
- Clothing/Fabrics
- Leather goods

Exempt Materials -- A General Vendors License Is NOT Required

◆ *The Sale of "Written Matter" and other First Amendment items:*

- Newspapers
- Books
- Periodicals
- Sports Trading Cards
- Pamphlets
- Items bearing political messages
(e.g. buttons, t-shirts, flags)
- Songs and movies (CDs, DVDs, videos)

◆ *The Sale of "Visual Art":*

These items were specifically delineated as "visual art" and therefore protected by the First Amendment in Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996):

- Paintings
- Photographs
- Prints
- Sculptures

You should be advised that the only available General Vendors licenses at this time are reserved for honorably discharged veterans. I am enclosing a copy of the General Vendors Law and a list of streets restricted to Book Vendors and Artists, also known as "First Amendment Vendors." Such vendors would also have to comply with all relevant display restrictions found in the law.

Sincerely,

Susan Kassapian
Assistant Commissioner for Legal Affairs
212-487-3961