There Ought To Be A Law: Consider This Alternative To Litigation

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Government is becoming more intrusive. At the state and federal levels, a host of agencies and departments continuously create new rules for us to live by. At the more local levels, our cities and counties have regulations and ordinances that increasingly control how and what we can do with our businesses, our homes, and our private property.

All too often, those intrusive rules and regulations frustrate a client's legitimate business or personal interests. But the old adage that you can't fight city hall is mostly true, and applies also to fighting governments and their bureaucracies at those different levels. So how can a lawyer help a client when faced with a growing body of unhelpful government rules?

Fortunately, not all legal problems require a lawsuit to fix. Litigation is the default way attorneys seek to resolve those problems. Lawyers naturally turn to the courts to deal with them. But sometimes, there is another way. Try to change the law.

Attorneys should think about this alternative, and clients should ask about it.

There is a simple reason why court challenges to a city or county ordinance, or to an administrative regulation, are frequently unsuccessful: The rules are written in such a way as to favor the government when its acts are challenged in court. Only if the challenged ordinance or regulation violates some controlling law—say the federal or state constitution or a governing statute—should the legal challenge succeed. And, frankly, only rarely do careful and competently advised government entities so sloppily draw an ordinance or regulation. If the unhelpful government action is legitimately passed, i.e., with proper notice and a sufficient vote, and the action is within the government's appropriate jurisdiction, then the action probably withstands a court challenge. Indeed it should survive since the courts exist to enforce, not change, the law.

But if the court cannot change the law, why not instead go to the government entity that *can*?

The First Amendment famously protects the freedoms of speech and religion. But it does more. It also protects the right of the people to petition their government for redress of grievances. Thus, when faced with an ordinance or statute that frustrates a client's goals, rather than reflexively filing a lawsuit, a lawyer should consider whether first simply to "petition" the government to change that frustrating law.There is a slightly pejorative word for this—*lobbying*—but it is constitutionally protected as a valuable American right.

A successful lobbying effort unfortunately is not as simple as the textbook civics lessons might suggest. It requires much more than going to a meeting of the government agency, for example, a city council or board of supervisors meeting, and asking for the change during the public comments. Most of those presentations frankly are haphazard and do not effectively engage policy makers. Moreover, California's open meeting law, the Brown Act, actually limits that opportunity for the public officials to engage. Local elected officials in fact are frequently instructed by their own attorneys not to respond to public comments during agendized meetings. And finally, it is difficult in the short time usually available for public comments to adequately raise and thoroughly address the concerns that would actually influence local elected officials to make a change in the law.

Instead, a serious effort to lobby for a change in an ordinance or statute requires not just access to the targeted official or officials, but an understanding of the law, economics, *and politics* that public officials will consider in deciding whether to change the law. That takes time, experience, and much thought to develop. Done correctly, a lobbying job is best approached as one would prepare for a court hearing. Evidence, "witnesses," and policy arguments are required to defend the underlying policy change the client wants to make. But this is a "hearing" with a crucial difference.

Public officials are not judges and react to different pressures than do judges in a court hearing. The effective lobbyist understands this. Because elected officials are charged with making the law, not merely enforcing it, the proposed change must be one that the official believes is in the public's best interest and can be defended to the public, most obviously at election time. An experienced and professional lobbyist will anticipate this and be prepared to explain why the proposed change is in the public good.

In short, a successful lobbying effort will not be the one with the most evidence to win in a court. It will be the one that achieves a

public policy goal that the official is willing to stand behind in the court of public opinion.

Finally, an important warning: Many jurisdictions have detailed rules governing lobbyists. Often, a lobbyist must be registered, pay a fee for the privilege of being registered, and make certain financial disclosures. These rules vary from jurisdiction to jurisdiction. Additionally, some activity might be considered lobbying by one government entity and not lobbying by another. It is necessary for any attorney who wants to petition a government to change the law, rather than go to court to force that change, to know those rules of lobbying and stay within them. This will avoid personal liability and improve the chances of success.

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