FIRST AMENDMENT AUDITS

WHAT ARE THEY AND HOW BEST TO RESPOND

THE BASICS

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(Less than 50 words)

11th Circuit has issued opinions that indicate that observation and recordings of public actors are part of the expressive conduct protected by the First Amendment.

FIRST AMENDMENT AUDITORS

- Who are they? Typically not an official position.
  - Constitutional activists?
  - Citizen journalists?
  - Modern cop-watchers?
  - Antagonists of government?
  - Internet attention-seekers?

FIRST AMENDMENT AUDITORS

- What do they do?
  - Record government officials and employees
  - Record in or on government buildings and facilities
  - Interact with government employees and others
- Basis for their activity?
  - Represented support for actions is that the courts have recognized that there is a First Amendment right to observe and record public officials in public places
- These auditors sometimes conflate or confuse "public buildings" with "public places" – will depend on experience and education
- They contend public places means all public property, not just streets, sidewalks, parks, etc.

FIRST AMENDMENT AUDITORS

- What do they do?
  - Come to public offices unannounced-sometimes in a group of people
  - Initiate contact
  - Will not identify themselves, purpose of visit or context of what they are doing- "Just filming for a story"
  - Can be belligerent and condescending especially if they encounter any resistance
  - Interrupt, demean, threaten lawsuits if they don't get their way
  - Alarming for you if you don't know to expect it and, do not have a clear simple plan for handling if and when it occurs

FIRST AMENDMENT AUDITORS

- What's the basis for this Activity?
  - The First Amendment to the United States Constitution
  - Counties are subject to the constitutional protections contained in the Bill of Rights.
  - Concept that video recording someone is a form of speech is a little odd
  - First Amendment protects freedom of the press, which is why a lot of these auditors will refer to themselves as "citizen journalist"

RIGHT TO RECORD UNDER THE FIRST AMENDMENT

- The First Amendment allows people to gather information about what public officials do on public property and gives them the right to record matters of public interest.
- However, the First Amendment is limited and does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.
- Governments have the power to preserve the property under its control for the use to which it is lawfully dedicated.

RIGHT TO RECORD UNDER THE FIRST AMENDMENT

Some examples:

- Protected:
  - Video recording law or code enforcement/citizen encounters - provided you are not interfering or obstructing the officer in the performance of his/her duties
  - Recording public meetings subject to Florida's Sunshine Law
- Not protected:
  - Filming within a jail or other secure area of governmental facilities
  - Filming county facilities not otherwise open to the public

WHAT RESTRICTIONS ON RECORDING ARE PERMITTED?

- Forum analysis is necessary
  - Traditional public forum
  - Designated public forum
  - Limited public forum
  - Nonpublic forum / no forum

TRADITIONAL PUBLIC FORUM

- Government properties that have traditionally been held for the use of the public and have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.
  - Examples: Public streets, parks, and sidewalks

Citizens have the greatest First Amendment rights in this forum

Governments ability to regulate speech in this forum is very limited

TRADITIONAL PUBLIC FORUM

- Restrictions permitted in reasonable time, place, and manner that are:
  - Content neutral
  - Narrowly-tailored to serve a significant government interest, and
  - Leave open ample alternative channels of communication
- Note "viewpoint" restrictions are never authorized
- Can limit what subject they can talk about, but not their view on it

DESIGNATED PUBLIC FORUM

- Government property that has not traditionally been regarded as a public forum but is intentionally opened up as a forum to the public at large
- Expressive activity in a designated public forum can be limited to a particular class of speakers instead of the general public
  - Example:
    - General public comment versus a limit to a particular agenda item
    - Restrictions allowed: same as for traditional public forums

LIMITED PUBLIC FORUM

- Where a government has reserved a forum for certain groups or topics
  - Agenda Items
  - Special meetings
- Each individual member of the group must obtain permission from the governmental proprietor of the forum, who in turn has discretion to grant or deny permission
- Examples:
  - The public comment portion of meetings subject to Florida's Sunshine Law
- Restrictions allowed:
  - Content-based restrictions permitted as long as they are not viewpoint based
  - Can place restrictions on amount of time to speak, relevance i.e., limited to district business, no disruptive behavior/profane speech

LIMITED PUBLIC FORUM

- Important to note the distinction between viewpoint discrimination and content discrimination

CONTENT DISCRIMINATION	VIEWPOINT DISCRIMINATION
If a county banned all speech about the big election	If a county banned all negative comments about Politician Doe

- While the former may be allowed in a limited public forum, the latter typically is not.

NONPUBLIC FORUM / NO FORUM

- Where the government acts as proprietor, managing internal operations
- Examples:
  - Business offices and restricted work areas for county staff
  - Bathrooms/Locker rooms
  - IT/records facilities-private, protected information
- Restrictions permitted:
  - Any unless arbitrary, capricious, invidious, or viewpoint based

COMMON PLACES FOR FIRST AMENDMENT AUDITS

- Lobby areas of government buildings: limited public forum/nonpublic forum
- Offices and workspaces for government employees: nonpublic forums
- Interior of polling places: nonpublic forums
  - However, different answers for streets and sidewalks immediately adjacent to polling places
- Public hospitals: nonpublic forums
- Courthouses: nonpublic forums

COMMON PLACES FOR FIRST AMENDMENT AUDITS POLICIES

The First Amendment protects the act of recording government officials in public spaces

Filming will be allowed in those areas of your facility which are open to the general public

Those who routinely interact with the public are subject to being confronted by these auditors and need to know how to handle these encounters

Even if they are annoying or distracting, they cannot be unreasonably disruptive or prevent employees from completing their work

Remember they are looking to instigate a confrontation and if they cannot provoke a reaction, they will likely go away

Follow your office policies!

HANDLING AUDITORS

- Your policy makers should "audit and harden" your facilities
- Designate and clearly mark nonpublic areas
    - Signs such as "Restricted Access-Employees" and "Invited guests only beyond this point"
    - On all potential ingress points- rear/side of building
    - Physical access controls- locked doors; key cards/controlled access
    - Obstruct views- blinds/window tint
- Don't be triggered by profane phrases or writings on t-shirts or signs
- If you feel unsafe or threatened contact law enforcement, but as a last resort

HANDLING AUDITORS

- You should receive training that includes such things as:
  - Stay calm-Avoid confrontation. Do not provide the desired negative reaction or hostility
  - Know where recording is and is not permitted and other applicable rules in facilities
  - Be familiar with the public and nonpublic areas of the workplace
  - Know who the designated person is to respond to an auditor
  - Anticipate the recording will be on the Internet – what you do will be there forever!
  - Provide simple, consistent instruction to the auditor
  - Do not debate or argue with the auditor
  - Expect to be interrupted, demeaned, antagonized
  - Do not restrict the auditor's activity in any way related to viewpoint
  - Don't touch them

IMPORTANCE OF APPROPRIATE RESPONSE

- Video will likely be posted on the Internet
- May attract attention from traditional media
- Official complaints against employees may require you to conduct an investigation
- Lawsuits
    - Federal claims carry liability for attorney's fees and litigation expenses, too.
    - Be aware that in some circumstances claims can be brought against individuals

COMBAT THEM WITH KINDNESS!!

Remember that they are sometimes looking for a fight.

Don’t give it to them!

THANK YOU

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