

MAMA Municipal Law Program

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First Amendment Auditors

Presented by

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Today's Presenter



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1st Amendment Audits

Show me the
money!

What & Who are They?

- Social movement that involves photographing or filming from a public space
- Auditors engaging in activism and “citizen journalism” to test constitutional right to record in a public space
- To promote transparency and open government

The Goal

- “Filming the police contributes to the public’s ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy.”



Pitfalls

Often confrontational in nature

Often refuse to self-identify or explain their activities

Often trying to escalate situation to enable litigation

IF NOT AWARE, IT WILL COST YOU MONEY

How Much Money

- Even with no damages, ATTORNEY FEES/COSTS
- Nominal damages
- Punitive damages
- Compensatory damages (How long were they incarcerated?)

What is a First Amendment Auditor?

- Social media activists, armed with mobile devices and a YouTube channel, have been pushing the boundaries of the First Amendment by entering public buildings, disrupting business and recording reactions.
- These "First Amendment auditors" are loosely organized, but aggressive; and their primary goal is to provoke a reaction.



Legal Background

- In 1991, George Holliday happened to have a video camera on hand to record Rodney King being violently beaten by the LAPD. The video been viewed millions of times.
- Today, everyone has a video camera in their cell phone.
- After high-profile police encounters in New York, Baltimore and Ferguson, Missouri, citizen activists are filming encounters between police and suspects. In this context, the federal courts have been highly protective of the rights of citizens to film police officers in public places.

Protected by the First Amendment

- It is clearly established that video recording of police encounters is a form of speech protected by the First Amendment. The case of *Fields v. City of Philadelphia* stated that the First Amendment provides the public a "right to record — photograph, film, or audio record — police officers conducting official police activity in public areas."



Continued

Expansion by the Auditors

- Although the phenomenon emerged as a way to monitor police activity, First Amendment auditors soon began exploring other possibilities, since language of federal cases found a **First Amendment right to film "public officials" in "public places."**
- First Amendment auditors claim **right to film public employees going about their business in public buildings.**
 - For example, auditors now arrive at government buildings in groups to wander around, filming and interfering with workers and residents.

What is Protected Speech?

- Under the First Amendment:
 - Recording public officials, including police
 - Ability to observe and, if desired, to photograph, video record or audio record government agents is guarded by the Constitution.
 - Individuals have a First Amendment *right to record when they are conducting business in a public place and where individual making the recording has a legal right to be present.*

What is Protected Speech?

- U.S. Supreme Court has also held that First Amendment protects right to collect and record publicly available information and to **publish** that information in any medium of a person's choosing.
 - In present context, we are often talking about YouTube, Facebook or similar sites.
- In effect, public has same rights to record police as the media.
- But, like most constitutional rights, freedom to record is not absolute. It is governed by reasonable **time, place and manner** restrictions.

Free Speech Restrictions

- What are time, place and manner restrictions?
 - **TIME** restrictions may be placed on persons when, for example, they would significantly affect the free flow of traffic and business.
 - **PLACE** restrictions may be imposed on locations generally considered to be publicly accessible.
 - **MANNER** restrictions are often associated with what is called “symbolic speech.”
 - For example, the government may restrict individuals from camping out in public parks to protest their causes, as was seen during the Occupy Movement. The government has a legitimate right to protect these public places from damage and to ensure that they are accessible to all.

Individuals Recording Cannot

Place themselves or others in danger

Trespass on private property

Enter a marked crime scene; or

“Materially interfere” with police activities

Guidelines for Recording - Police

- For officer safety, photographers, like other persons, should be required to **maintain a safe distance from officers**. To ensure that a safe distance is maintained by all persons present, an officer may request backup assistance.
- Recording individuals may be required to move from places where they could **endanger themselves or compromise police operations**, such as serving a high-risk arrest or search warrant.
 - However, these and related situations should not be used as a **pretext** to prevent recording.
- **Verbal criticism and derisive comments** made by recording parties, or others from a location that has no direct impact on police operations or safety, are not actionable by themselves.

- Legality of recording in public is clearly established
- Are they in a public space?
- Are they actually interfering with police activity?
- Did we give them a warning (was it a legal directive)?

Profanity & Insults Don't Make it Illegal

- Cussing canoeist – statute unconstitutional
- Have thick skin/don't react/respond
- Disorderly conduct ticket is NOT the answer
- Insulting police is a constitutionally protected right



Reasonable Suspicion

- Recording in a public place, alone, does not constitute reasonable suspicion to detain individual
- Or to demand ID



Practical Responses

- First Amendment audit is always uncomfortable and can be disruptive, but there are practical ways to prepare and respond:
 - **Educate employees.** All public-facing employees should have some familiarity with First Amendment audits and how to respond. Although auditors often exceed their rights under the First Amendment, they do have the right to film public employees in public places.
 - **Don't overreact.** Auditors are trying to provoke a negative reaction that they can post on social media. A video of a public employee responding calmly is not going to result in much traction. Best defense is simple patience.

Continued

Practical Responses

- **Identify and mark nonpublic forums.** In many cases, auditors will try to enter private areas, hallways or offices. The municipality has a right to mark these areas as nonpublic and to impose reasonable regulations on the right to film in them. Nonpublic forums can include any areas into which, under ordinary circumstances, visitors must be invited before entering.
 - Examples include hallways, cubicles, offices and workspaces.



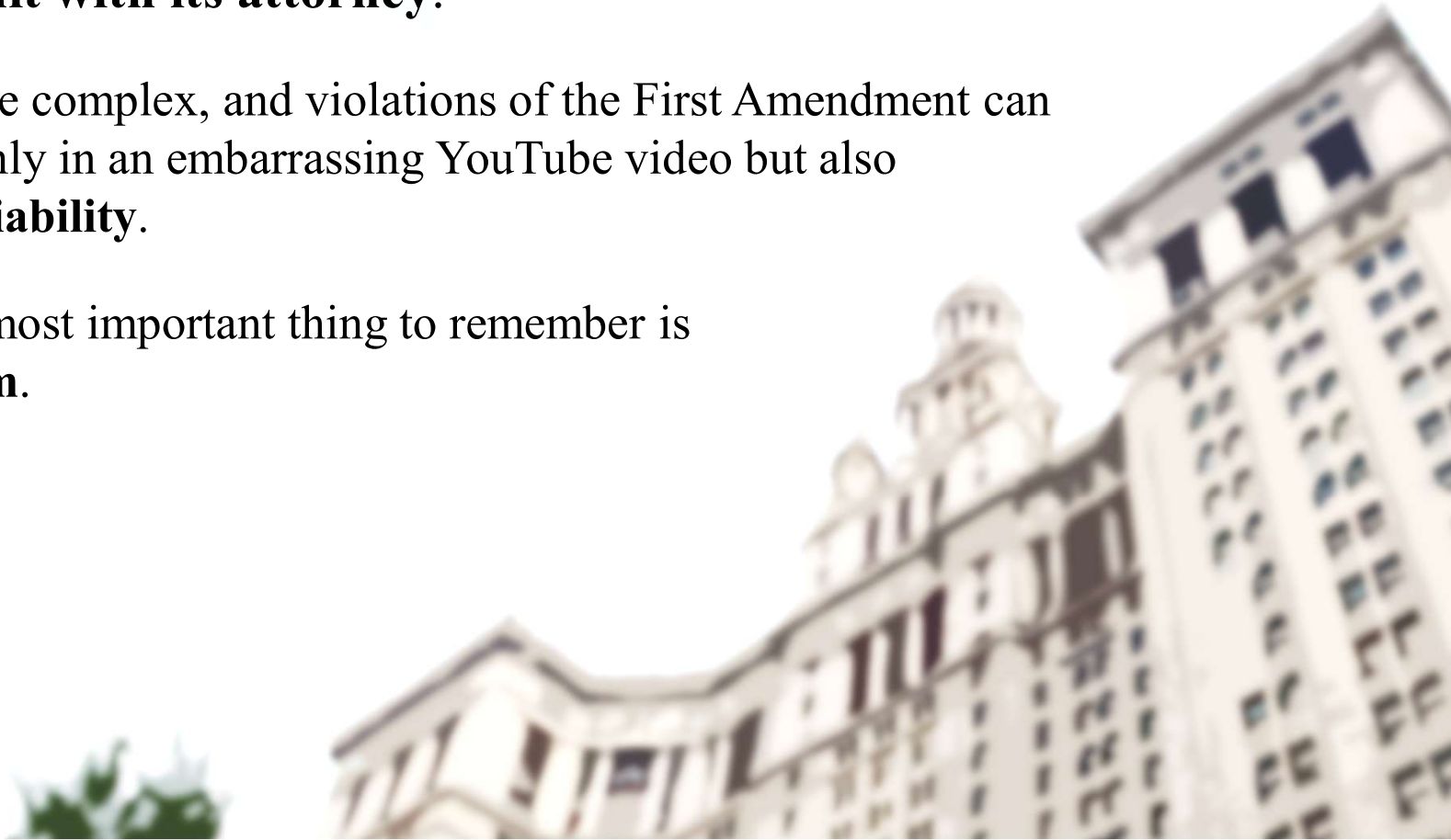
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- **Consider rules about harassment.** Some auditors may engage in conduct that rises to level of harassment. They may claim they can demand answers or invade privacy of private residents.
- In at least one instance in South Carolina, an individual claiming to be an auditor harassed a female employee by filming her repeatedly and at length.
- Municipalities can adopt appropriate regulations about such harassment and abusive behaviors.

Continued

Practical Responses

- **Before adopting any specific regulations, a municipality should consult with its attorney.**
 - The rules are complex, and violations of the First Amendment can result not only in an embarrassing YouTube video but also **monetary liability**.
 - Again, the most important thing to remember is to keep **calm**.



Questions?



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