

First Amendment Auditing

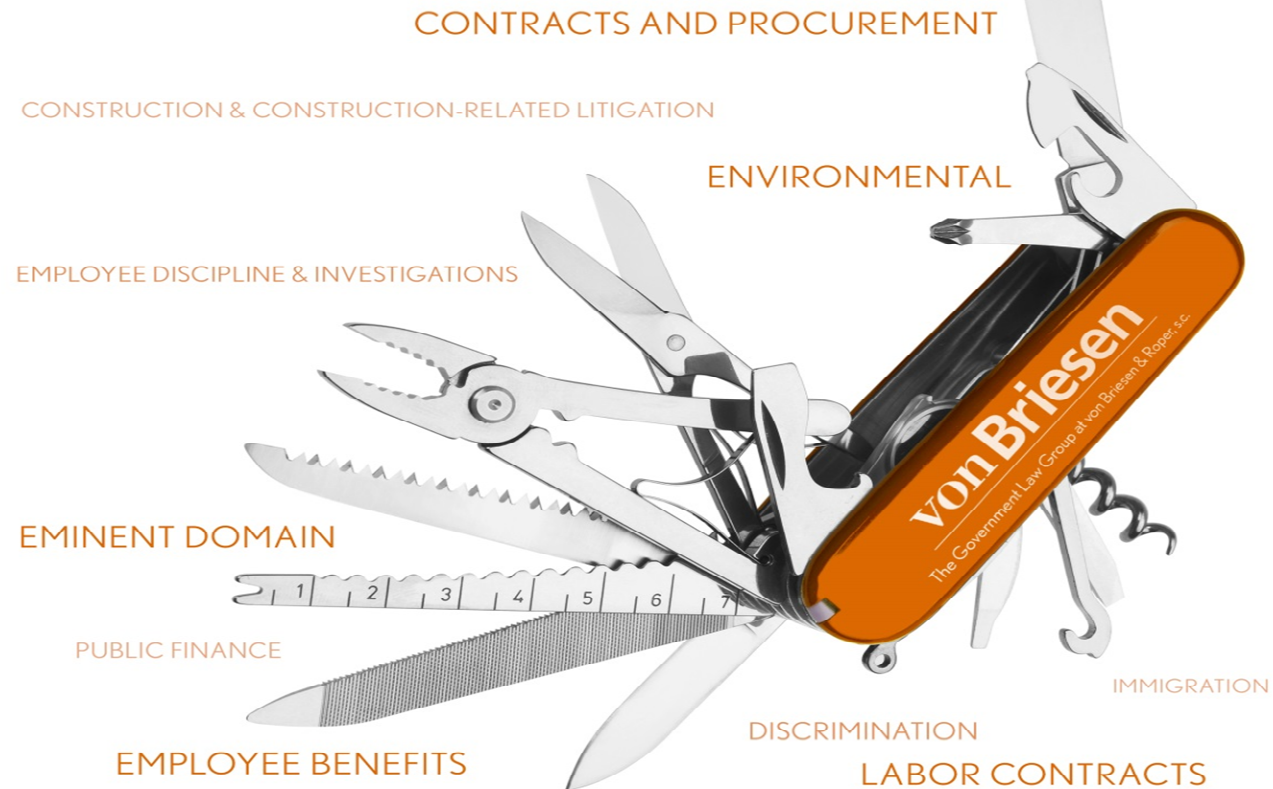
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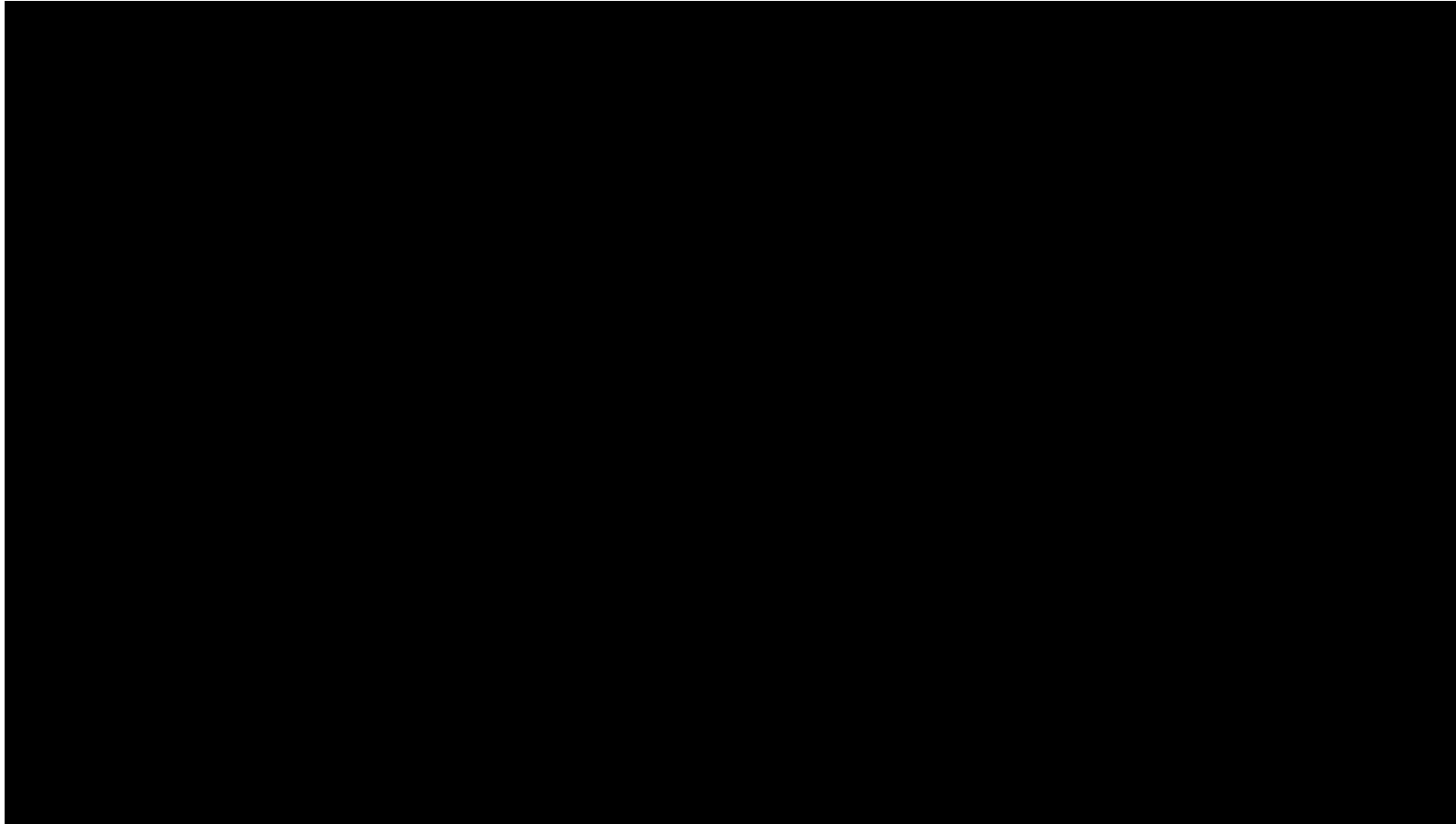
WHEN IT COMES TO GOVERNMENT LAW, **WE DO IT ALL.**



What is a First Amendment Audit?

- When individuals or groups (“Auditors”) film on government property to test their rights to film or enter a public space.
- Confrontational audits, or ones where government employees interfere with filming, are often posted to YouTube.

Example



Agenda

- I. The Right to Access
 - a. Public Forum
 - b. Designated Public Forum
 - c. Nonpublic Forum
- I. The Right to Record
- II. What to Expect During Encounters
- III. Best Practices Prior to Encounters
- IV. Best Practices During Encounters

The Right to Access

- The right to access public property and the standard by which limitations upon free speech exist differ depending on the character of the property.
- Courts have defined three types of public property:
 - Public Forums
 - Designated Public Forums
 - Nonpublic Forums

Public Forums

Definition

- An area that has been traditionally used for expressive activity like assembly or debate.

Examples

- Streets, sidewalks, public parks

Speech Limitations

- Government may enforce reasonable time, place, and manner of expression restrictions which are content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Designated Public Forums

Definition

- Public property the state has opened for use by the public as a place for expressive activity.

Examples

- University meeting facilities, school board meetings, municipal theaters

Speech Limitations

- Government may enforce reasonable time, place and manner restrictions.
- Content-based prohibitions must be narrowly drawn to achieve a compelling state interest.

Nonpublic Forums

Definition

- Public property which is not by tradition or designation a forum for public expression (a.k.a. all other public property).

Examples

- Military bases, polling places, prisons, airport terminals

Speech Limitations

- Government may enforce reasonable time, place, and manner of expression restrictions which are content neutral and compatible with the intended use of the property.
- For example, courts have allowed limitations that prevent employees from being interrupted while performing work on the property.

The Right to Record

- The right to record is protected by the First Amendment.
 - Specifically, the public may record police officers conducting official police activity in public areas.
- This is a relatively new protection and, therefore, the standards by which government may limit this right are not well defined.
- Generally, public officials may place reasonable time, place, and manner restrictions on this right if the restrictions are necessary to maintain safety and control. Confidentiality concerns also support the imposition of restrictions (*e.g.*, client confidentiality in human services.)

Case Example

Turner v. Lieutenant Driver

Facts

- Turner was videotaping a police station from a public sidewalk across the street.
- While filming, he was approached by two officers who asked for his ID. He refused and began arguing with the officers.
- The police took his camera, handcuffed him, put him in the back of their patrol car, and called a supervisor.
- When the supervisor arrived, he released Turner and returned his camera.

Case Example

Turner v. Lieutenant Driver

Holding

- The right to record police exists, subject to reasonable time, place, and manner restrictions.
- The officers were entitled to qualified immunity only because the right was not clearly established at the time of Turner's arrest.
- Going forward, the right is clearly established.

*Case takes place in a different jurisdiction.

Case Example

Fields v. City of Philadelphia

Facts (This case involves the separate claims of two people: Fields and Geraci.)

- Fields a college student, took a photo of police breaking up a house party. He was arrested and his phone was searched.
- Geraci a member of a police watchdog group, was pushed up against a wall by police and prevented from recording the arrest of a protestor. She was not arrested.

Case Example

Fields v. City of Philadelphia

Holding

- Both plaintiffs had the right to record police officers conducting official police activity in public areas.
- The right to record is not absolute and can have reasonable time, place, and manner restrictions.

*Case takes place in a different jurisdiction.

Case Example

Braun v. Terry

Facts

- Braun, an opponent to same-sex marriage, was protesting at the Milwaukee County Courthouse the day after Wisconsin's same-sex marriage ban was found unconstitutional.
- For crowd control and safety, the courthouse had a policy that day to only allow individuals inside who had official business.
- Braun attempted to enter the courthouse, but was turned away by the deputy because he did not have official business. He was not arrested or cited.

Case Example

Braun v. Terry

Holding

- The deputy **DID NOT** violate Braun's Freedom of Speech rights by not allowing him into the courthouse.
- The *interior* of the courthouse is a nonpublic forum because it is not traditionally or designated as a place of public expression.
- Braun was not denied access because of his viewpoint, but rather the "official business" access policy that day.
- The access policy was reasonable to the courthouse's function of facilitating impartial judgment and warranted because of the high volume of people present that day to receive marriage licenses.

Case Example

Adderly v. State of Fla.

Facts

- A group of college students staged a protest at a county jail.
- The protestors walked up a jail driveway and to a jail entrance that were usually used to transport prisoners.
- The protestors blocked jail vehicles from passing and officials from using the entrance.
- After refusing the sheriff's command to leave, approximately 100 protestors were arrested. Many were later convicted.

Case Example

Adderly v. State of Fla.

Holding

- The convictions did not unconstitutionally deprive the petitioners of their rights.
- The driveway and entrance the protestors were blocking were necessary for transporting prisoners and the state had the power to preserve the property under its control for the use to which it is lawfully dedicated.
- The limitation on their speech was not content-based.

What to Expect During an Encounter

- Auditors may circle the property while filming or attempt to enter facilities, including open garages or spaces that have unlocked doors.
- Auditors will usually be openly filming.
- Auditors usually know their rights related to filming public spaces and officials, when they must provide identification, under what circumstances they may be detained, and other rights.

What to Expect During Encounters

- Auditors take on different styles: some are quiet and unassuming while other auditors may be openly vocal and even try to bait employees into an argument by being disrespectful, rude, and condescending.
- Auditors will usually not identify their reason for recording or provide identification if asked.
- Auditors expect to be confronted.
- Some are prepared to be detained and arrested.

What to Expect During Encounters

- This raises three questions:

Query 1: What type of encounter is bound to be posted to social media, used by the media, and used to gain followers?

Query 2: What type of opportunities will you provide them?

Query 3: When engaged, what type of encounter will you provide them?

Best Practices Prior to Encounters

- **Identify and mark nonpublic forums.** Mark restricted areas such as garages, hallways, cubicles, offices and workspaces with signs that define access. *Examples*

“Authorized Personnel Only”

“Employees Only”

“No Admittance without Official Business.”

- **Educate employees.** All public-facing employees should have familiarity with First Amendment audits and how to respond to them.

Best Practices Prior to Encounters

- **Preserve Security.** Areas marked as restricted access must be kept secure. Doors must be closed and locked. Windows must be secured. Access must be privileged and only for legitimate purposes
- **Enforce Policies and Expectations of Employees.** Employees must be accountable for preserving security. If the area presents a safety issue, then discipline like it does.

Best Practices During Encounters

When contacting an auditor, DON'T

- Overreact.
- Attempt to take their recording device.
- Arrest or detain them based only on the fact they are recording.
- Follow or intimidate them.

Best Practices During Encounters

When confronting an auditor, DO

- Stay calm.
- Be polite and patient.
- Act in conformity to the Department's Mission, Vision and Values
- Comply with Policies and security requirements
- Let them film as long as they are not committing any crimes or disrupting the use of the property.

Best Practices During Encounters

DO

- Be aware of individual First Amendment rights, as well as an officer's ability to enforce reasonable time, place, and manner restrictions which are content neutral and compatible with the intended use of the property, including preventing employees from being interrupted while performing work.

Questions?