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in partnership with

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Public videotaping

Citizens may openly record officers in public, provided that they do not interfere with police operations. Many officers become perturbed when citizens attempt to videotape them performing their official duties. While citizens cannot secretly record officers, they are certainly within their rights to take pictures of and record officers performing public functions.

Rather than react, officers must remain calm and carry out their functions in the same professional manner were the cameras not rolling. Otherwise, they risk liability for themselves and their department.

- **Recent federal case concerning a Massachusetts department.** Consider *Glik v. Cunniffe*, United States Court of Appeals No. 10-1764 (August 26, 2011): Simon Glik, an attorney, was arrested for using his cell phone camera to film several police officers arresting a young man on the Boston Common.

Concerned that officers might be using excessive force, Glik stopped roughly ten feet away and began recording. After placing the suspect in handcuffs, an officer said: "I think you've taken enough pictures." Glik replied: "I am recording this. I saw you punch him." Another officer then asked whether Glik's phone recorded audio. When Glik confirmed this, he was arrested, brought to the station and booked (with his phone and flash drive held as evidence).

The charges related to the incident -- "secret recording" under G.L. c. 272, § 99 and "disturbing the peace" -- were subsequently dismissed in the Boston Municipal Court. Glik then successfully sued for "false arrest" in federal court.¹

- **First Amendment allows documentation of police work.** The right of free speech gives citizens the opportunity to criticize the government (especially law enforcement) and to document its activities. In *Glik*, the federal court insisted that police officers should know that citizens have a First Amendment right to film their activities. If peacefully done, officers lack the authority to stop them:

¹ Technically, the Appeals Court determined that the officers did not have immunity for their behavior because it was so blatant. The court did not assess damages, which can only occur after trial or settlement. Practically speaking, however, once an immunity claim is denied, the plaintiff will often recover.

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“The same restraint demanded of law enforcement officers in the face of ‘provocative and challenging’ speech, . . . must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.”

- **Videotaping is not “secret” just because officers are unaware they are being filmed.** The citizen’s open display of the recording device is the important factor, not the point at which officers become aware. Moreover, the court rejected the argument that, because a cell phone has many other functions (e.g., email, texting, calling), its removal and display did not alert the officers that they were being recorded. From now on, once a typical recording device is held in “plain view,” officers are “on notice” that they are being recorded.²
- **Two limits on videotaping.** The *Glik* decision acknowledged that “the right to film is not without limitations.”
 1. **Interference.** Officers may impose *reasonable* time, place and manner limitations. *Glik* noted that the situation here -- a citizen in an open park -- might be viewed differently in another context, such as a traffic stop. If a citizen’s recording activity is interfering with the police operation, Attorney Scheft recommends:
 - **Do not order citizens to turn off their cameras.**
 - **Instead, tell them what they must do to stop interfering with police business.** Here are examples of verbal direction:
 - “Sir, you’re too close. Go over to the sidewalk and stand there.”
 - “Excuse me, you cannot interfere with my interview. You must be no closer than the red car over there.”Since recording is legal, focusing on the improper behavior – not the act of recording itself – is easier to justify in court.
 2. **Evidence.** Sometimes officers may need to confiscate a recording device as evidence. But the police have to be careful. The following principles apply:
 - **Seizing a video camera or phone that contains footage about a crime is lawful, and may be done without a warrant based on exigent circumstances.**³

² This case is in marked contrast to *Comm. v. Hyde*, 434 Mass. 594 (2001), where the defendant turned on a recorder that was concealed in his pocket. The SJC upheld his felony conviction for the illegal secret recording.

³ The *Glik* case did not discuss the propriety of seizing a phone as evidence.

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- **Once seized, officers should explain to the citizen that he may consent to having the phone sent to a computer laboratory, where *only* the video of the incident will be extracted and preserved as evidence.** The phone will be returned to the citizen as promptly as possible. If the citizen agrees, the officer should provide a receipt for the device, call a supervisor to the scene, and turn it over in the presence of the citizen.⁴ A forensic computer laboratory may then extract the footage and return the phone with the video still on it, documenting the process.
- **If the citizen refuses to consent – and the video evidence is deemed important to the criminal investigation – then officers should apply for a search warrant to retain and process the recording device.**
- **Big caution: In most cases – particularly if the police arrest was problematic – there will be an allegation that the recording device is being seized as part of a cover-up.** This means, to put it bluntly, that officers who seize video evidence will often invite far more scrutiny and trouble than the evidence is worth. That is why obtaining supervisory input is so important. A decision to hold a citizen's recording device as evidence should be made in "good faith" -- not as a "pretext" to suppress that citizen's First Amendment activity.

Question of the month

How do cops deal with one way street violations?⁵ A number of the traditional ways that officers have dealt with one way street violations have been rejected by the Registry of Motor Vehicles *and* the Merit Rating Board. Consequently, officers may *not* issue a citation under G.L. c. 89, § 9 or G.L. c. 89, § 10 or G.L. c. 85, § 2 or G.L. c. 85, § 5! None of these will be accepted.

There are *only* three possible strategies for one way violations:

- **Bylaw or Ordinance.** If your municipality has an ordinance or bylaw that specifically deals with one way violations, you may reference it on your 90C citation and assess the fine allowed under your particular local law. The court code for this violation (or any other local ordinance/bylaw vehicle infraction) is "555555".⁶
- **State highway.** If the violation occurs on a state highway in your jurisdiction, cite to 720 CMR 9:05 and assess a CMVI of \$20. Note: This only applies to a violation on the actual state highway, not a connecting road.

⁴ Simply taking the phone and dropping it into the evidence room until the trial is over – absent consent or a warrant – will probably be viewed by a court as unconstitutional and punitive to the citizen.

⁵ Thanks to Sergeant Matt Reis of the Somerset Police Department!

⁶ Some officers have made the engaging suggestion that the court might adopt the code of "666666"!

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- **OTE justification.** Finally, if you are patrolling on a local road (that is not a state highway), and your community does not have a one way bylaw/ordinance, then Operating to Endanger (OTE) is the only justification for stopping a vehicle proceeding the wrong way on a one way street.

OTE occurs when a motorist operates on a public way so that “the lives and safety of the public *might* be in danger.”⁷ Certainly, driving the wrong way provides at least a reasonable suspicion for the vehicle stop. However, unless particularly blatant and dangerous, Attorney Scheft does not recommend that officers issue a citation (or, perish the thought, arrest) for OTE based on a “garden variety” violation. A verbal warning is probably the best course of action *unless* the OTE-based stop leads to evidence of some other infraction – e.g., OUI, unlicensed, etc.⁸

Keep doing the right thing by staying professional on the street!

John Sofis Scheft

⁷ For more on OTE, see Scheft, J., *Massachusetts Motor Vehicle Police Manual 2011* at page 9-23 to 9-25.

⁸ This approach has not been specifically approved by any Massachusetts appellate court, but it makes sense under existing case law.