



WEBINAR

**Pitchess Motion Fundamentals –
Everything You Need to Know to Successfully Oppose
Them**

Tuesday, February 28
10:00 – 11:30 a.m.

Speakers:

Gregory P. Palmer, Senior Associate, Jones & Mayer
Juli C. Scott, Chief Assistant City Attorney, Burbank

DO YOU KNOW THIS MAN?



Sheriff Peter Pitchess

BIZARRO By Dan Piraro

You have the right to remain silent. Anything you say will probably be inadmissible as evidence. If you notice the smallest mistake on my part, you can get off scot-free. Don't try very hard to escape 'cuz I could get in a lot of trouble if you hurt yourself in the process...

These cuffs too tight?



Pitchess v. Superior Court (1974)
11 Cal.3d 531

- Evidence of prior complaints against officer is relevant to establish character trait of officer
- Balance the Defendant's need and good cause for citizen complaint investigations against need to maintain secrecy of "official information" (Ev. Code Sec. 1040)

The Legislature's Response to
Pitchess

- *Protect* Personnel Records from Random Discovery
- Provide for *Retention* of Relevant Records
- Impose *Limitations* on Discovery and Dissemination

Penal Code § 832.5

- Every agency employing peace officers must establish procedure for investigating complaints by members of the public
- Written description of complaint procedure must be made available to the public
- Complaints, reports, findings must be kept for at least 5 years

Penal Code § 832.7

Peace officer personnel records and records of citizen complaints or *information* obtained from these records are confidential and “*shall not*” be disclosed in any criminal or civil proceeding except by discovery pursuant to Evidence Code §§ 1043 and 1046.

Evidence Code §§ 1043

Discovery of Peace Officer Personnel Records is a TWO-STEP Process

- STEP ONE: Noticed Written Motion to Agency having custody of the records that includes:
 - Description of Records/Information sought
 - Statement upon reasonable belief that the government has the records or information sought
 - Affidavits showing **good cause** for discovery and its **materiality** to subject matter of the pending litigation
 - Provide Police Report if alleging excessive force against officer(s)
 - Notice of Hearing per CCP §1005 – 16 Court days plus 5 for mailing

Evidence Code §§ 1043

TWO-STEP Process



STEP ONE

The Threshold: Affidavits Must Show *Good Cause* and *Materiality*

- Affidavits must show **good cause** for discovery and its **materiality** to subject matter of the pending litigation
 - Must allege officer misconduct by providing **Specific Factual Scenario** establishing **Plausible Factual Foundation** for materiality
 - Attorney's Declaration may be made on Information and Belief;
 - Hearsay, Supposition, and Speculation are also allowed
 - May not simply cast about for any helpful information

Evidence Code §§ 1043
Discovery of Personnel Records, Step One
Specific Factual Scenario and Plausible Foundation

Defense Declaration Must Allege Facts:

- Officer Misconduct described with some specificity
 - Plausible scenario
 - Internally consistent
- Defense to Charges
- Articulate a Logical Link Between Misconduct and Defense
- Seek only information from officer's personnel file that is related to the misconduct alleged
- No conclusory statements

Evidence Code §§ 1043
Motions Filed Under Seal

- Trial Court has inherent discretion to allow declaration to be filed under seal in order to prevent disclosure of privileged information
- Court must balance interest of accused in protecting privilege and right of officer and department to effectively challenge motion

Evidence Code §§ 1043
Motions Filed Under Seal

- Defense counsel must follow procedure:
 - Give proper and timely notice of privilege claim
 - Provide Court with affidavit sought to be sealed *and* proposed redacted affidavit
 - Serve proposed redacted version on opposing counsel
- Trial Court holds *in camera* hearing with defense counsel present to consider request
 - Defense counsel must explain how information would risk disclosure of privilege if revealed and show why information is required for motion
 - Opposing counsel may propound questions for trial court to ask defense counsel during *in camera*

Evidence Code §§ 1043
Motions Filed Under Seal

- Court may allow filing under seal if:
 - court concludes parts of affidavit pose risk of revealing privileged information *and*
 - Filing under seal is the *only* feasible way to protect privilege

STEP ONE (continued):



Evidence Code §§ 1043
Discovery of Personnel Records, Step Two
The *In Camera* Hearing

- Who May Attend?
 - Person authorized to possess records – aka Custodian
 - Whoever the custodian wants, e.g. City Attorney
 - Court Reporter
 - Officer whose records are sought
- Who May *Not* Attend?
 - Criminal defense attorney
 - Prosecutor

Evidence Code §§ 1043
Discovery of Personnel Records, Step Two
The *In Camera* Hearing

- Avoid confusion by clarifying on the record what the judge expects you to bring to the *in camera*
 - Which officers
 - What types of complaint investigations
 - For what time period
- Custodian should bring “all potentially relevant” documents
- Entire Personnel File is not required to be brought

Evidence Code §§ 1043
Discovery of Personnel Records, Step Two
The *In Camera* Hearing

- Court must *BALANCE* defendant’s need for disclosure and officer’s privacy interests
- Custodian Must be Sworn
- Court must consider Relevance of requested information to defense
- Request a Protective Order

Evidence Code §§ 1043
Discovery of Personnel Records, Step Two
The *In Camera* Hearing

- Court should only release names and addresses of complaining witnesses
 - With exceptions
- Court must exclude remote facts of little/no practical benefit
- Court must exclude conclusions of investigation in criminal case
- Court should exclude complaints concerning conduct occurring more than 5 years before incident

Rights of Prosecutors to Peace Officer Personnel Records

- Prosecutors Do Not have to follow *Pitchess* process where they are investigating conduct of officer or officer's agency or prosecuting officer
 - Only file relating to incident under investigation
 - Must maintain "non-public" nature of files
- Prosecutors Do Have to normally follow *Pitchess* procedure for information in peace officer's personnel records

Brady v. Maryland (1963) 373 U.S. 83

- **Brady Does Not:**
 - Confer a Catchall Discovery Right for all "exculpatory" information
 - Authorize discovery of anything in officer's file that could be impeaching
 - "Trump" *Pitchess*
- **Brady Does:**
 - Require disclosure of evidence by the prosecution that would be material to the fairness of the trial – (outcome would be different without it)
 - Operate in tandem with *Pitchess* – *It is a narrower materiality standard*
- If defendant cannot meet *Pitchess* standard of materiality, he cannot meet *Brady* standard

Vela v. Superior Court (1989) 208 Cal.App.3d 141

- Questions presented:
 - Is the City entitled to assert attorney-client privilege over investigative statements taken by Special Investigating Team from police officers who were percipient to criminal activity?
 - Are the officers' statements discoverable by defense in criminal action?
- The City holds an attorney-client privilege regarding SIT reports and absent compelling circumstances, may assert such privilege to prevent disclosure
- Trial Court must determine whether compelling circumstances exist to defeat attorney-client privilege.

Pitchess in Civil and Administrative Proceedings

- PC § 832.7 creates a conditional privilege that covers both criminal and civil proceedings
- PC § 832.7 is the exclusive method for obtaining personnel records *and* information contained in them
- Cannot circumvent mandatory statutory process by asking questions through deposition or interrogatories
- Privilege is held by both Officer and Agency
- Officer cannot prevent disclosure by Agency
- Officer has no reasonable expectation of privacy or private right of action for disclosure of personnel information even after no longer employed

Pitchess in Civil and Administrative Proceedings

- “Good Cause” and “Materiality” may be different in civil case
- Court balances needs of litigants and relevant information in civil cases is different from criminal
- Courts have released investigation reports of incident (forming basis of lawsuit as directly relevant to the matters at issue in the case
- Subjective conclusions of investigators irrelevant and redacted
- All released materials still subject to protective order

Pitchess and Federal Law (Civil)

- State law privileges are not binding on federal courts adjudicating federal rights
- Evidentiary privilege questions are governed by principles of federal common law
- Federal courts should give some weight to state privilege statutes and balance competing interests of plaintiff and police officers and agencies
- Seek in camera review and a protective order

Pitchess and Federal Law (Criminal)

- 9th Circuit requires prosecutor to find out from police department if evidence material to the defense is in officers' personnel files
- Prosecutor is required to examine the files
- Where prosecutor is uncertain about materiality of information, they may submit to trial court for *in camera* inspection
- Federal Rules of Criminal Procedure restrict use of subpoenas by defense for third party records - If you receive subpoena for personnel records, contact the U.S. attorney and move to quash if necessary

Odds and Ends

- City Attorney may review police personnel records for purposes of formulating response to discovery motions for the records
- City Manager, Asst. City Manager and citizen review board may only inspect police personnel records *if* they are authorized by charter, ordinance, regulation to investigate complaints, advise, impose or review discipline of officers
- City may disclose circumstances and results of internal investigation when officer publicly makes false statements about it through tv, radio, newspaper or other established means of communication
- Name of officer, employer, dates of employment and names of officers involved in on-duty shootings are not protected from disclosure

Appellate Review of Discovery Orders

- Writ of Mandate is appropriate remedy for review of trial court 's decision on discovery
- Post- Judgment remedies not adequate to redress erroneous disclosure – Once privacy is breached it cannot be restored
- Review is *de novo* and abuse of discretion standard applies
- Seek a Stay

Thank you Sheriff Pitchess!


