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Pitch-ing for the win

HOW A *PITCHESS* MOTION CAN BE USED TO OBTAIN CRUCIAL EVIDENCE IN MOTOR-VEHICLE COLLISION CASES WHERE ONE OR MORE DEFENDANTS IS IN LAW ENFORCEMENT

When you take a case where the defendant driver is someone in law enforcement, you are immediately paced for an uphill battle. In addition to perception and credibility issues, you will potentially face a uniformed officer as a defendant at trial. There are numerous hurdles during the discovery phase of the case exclusive to law enforcement – not present with other defendants – that you must overcome. Often, information crucial to your case that is routinely obtained in similar motor-vehicle collision cases will not be produced. Instead, it is withheld from you under the routinely asserted peace officer's "privacy" objection. The purpose of this article is to help assist you in bypassing this common tactic employed by defendants and help you gain access to the vital evidence that can win cases.

Police, privacy, and the *Pitchess* motion

How often have you served what you thought were routine discovery requests in a motor-vehicle collision case seeking routine documents such as: incident reports and notes, internal investigative reports and notes, training documents, photos, videos, witness statements, any and all conclusions from internal investigations, driving records, reports from prior collisions, prior driving citations, all review committee conclusions or results, safe driving training documents/records, and disciplinary action documents, etc.?

However, because your defendant was a member of law enforcement, rather than receiving code-compliant responses

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and documents you get an objection. An objection similar to something like:

> Responding Party objects to this request on the grounds that it seeks information protected from disclosure by Penal Code § 832.5; Evidence Code §§ 1043 and 1045; see also *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 400. Responding Party also objects to this request on the grounds that it seeks information protected from disclosure by Government Code §§ 6254 and 6275, *et seq.*

What the above objection often means in your case is that the defendant is trying to withhold from producing potentially relevant and critical evidence during discovery by claiming that it is protected because it is located in the defendant officer's personnel file. If you have had this experience, it is a frustrating situation, but one in which there is a solution that can give you access to a wealth of information to assist your client and build your case – the *Pitchess* motion.

What is a *"Pitchess"* motion?

A "*Pitchess*" motion, is a motion brought pursuant to Evidence Code sections 1043-1047 and allows you to seek an order compelling disclosure of the personnel records of a peace officer that are "relevant to the matter involved in the pending litigation." (Evid. Code § 1045 subd. (a); see also *People v. Mooc* (2001) 26 Cal.4th 1216, 1226, 1229.) Police officer records maintained by any state or local agency are confidential and cannot be disclosed in any civil proceeding except by discovery pursuant to sections 1043 and 1046 of the Evidence Code.

Usually, these motions are utilized to obtain information and documents from prior incidents involving a defendant officer in excessive force/police shooting or civil rights cases. However, these occurrences are not the only issues in which it can and should be used. Very often in a motor-vehicle collision case involving a peace officer, defendants will refuse to produce information relevant in your case, claiming that information is privileged as it is contained in the officer's personnel file. Additionally, the fact that a peace officer was *off duty* does not make the officer's personnel file any less discoverable. (*People v. The Superior Court* (McKunes) (1976) 62 Cal.App.3d 853, 857.)

This is information you need to acquire, and information that you can only obtain if you properly follow the statutory requirements via a properly drafted *Pitchess* motion. The key to unlocking withheld documents with a *Pitchess* motion is demonstrating the existence of good cause. What follows below is a brief outline of the key components of a *Pitchess* motion and how to best use it to show good cause to obtain documents important to your peace officer motor-vehicle collision case.

Pitchess process

There is a special two-step procedure for securing disclosure of peace officer personnel records. First, the party seeking the records must file a proper motion, and then if the judge finds there to be good cause, he or she will order an in camera hearing to review the documents and order production of those documents which he or she finds relevant to the subject matter. (*Warrick v. Sup. Ct.* (City of Los Angeles Police Dept.) (2005) 35 Cal.4th 1011, 1019; *California Highway Patrol v. Sup. Ct.* (Luna) (2000) 84 Cal.App.4th 1010, 1019.) This procedure applies to both criminal and civil actions. (*County of Los Angeles v. Superior Court* (1990) 219 Cal.App.3d 1605, 1610-1611.)

Motion and supporting documents

First, the party seeking disclosure must file a motion that identifies the peace officer, the agency in possession of the records, a description of the records, who is seeking the records, as well as the time and place of the hearing. (Evid. Code, § 1043, subd. (b)(1).) The motion must be accompanied by a declaration: showing "good cause" for disclosure of the records; setting forth the materiality of the records; and stating upon reasonable belief that the governmental agency has the requested documents. (Evid. Code, § 1043, subd. (b)(3).)

Since the party seeking disclosure usually does not know the contents of the records, it may be difficult to establish "good cause" for disclosure. However, California case law has established a relatively low threshold for the party seeking disclosure. Declarations on information and belief (i.e., hearsay) have been held sufficient. (*City of Santa Cruz v. Mun. Ct.* (Kennedy) (1989) 49 Cal.3d 74, 88.) In fact, the moving party need show only a "plausible factual foundation" for discovery – i.e., a scenario of officer misconduct that might occur or could have occurred. (*Warrick v. Sup. Ct.* (City of Los Angeles Police Dept.), *supra*, 35 Cal4th at 1026.). All that is required is the presentation of a scenario that might have or could have occurred; i.e., a "relatively low threshold." (*Uybungco v. Sup. Ct.* (San Diego Police Dept.) (2008) 163 Cal.App.4th 1043, 1048.) (This concept as it pertains to a motor-vehicle police officer case is discussed in greater detail below.)

Notice

Next, notice must be served in compliance with Code of Civil Procedure section 1005, subdivision (b) on the parties and on the governmental agency in custody of the records. (Evid. Code, § 1043, subdivision (a).) The agency is required to notify the individual officer whose records are sought. (Evid. Code, § 1043 subd. (a).)

The hearing

After the motion is filed and proper notice is provided, a hearing is held in open court, where counsel for the agency or the peace officer typically appears. The court must determine whether good cause exists for disclosure, which, if found, leads to an in camera hearing. (*City of Los Angeles v. Sup. Ct* (Brandon) (2002) 29 Cal.4th 1, 9.)

The in camera hearing

Next, following a finding of good cause by the court, an in camera hearing must be held in the judge's chambers. (*Slayton v. Sup. Ct.* (Slayton) (2006) 146 Cal.App.4th 55, 61; *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 1541.)

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The parties to the lawsuit are not allowed to be present in chambers. Only the judge, the custodian of records for the agency, sometimes the attorney for both the agency and the officer, and a court reporter participate in this second phase of the disclosure process. (Evid. Code § 915, subd. (b); *People v. Mooc*, 26 Cal.4th at pp. 1226, 1229.)

Order for disclosure of "relevant" records

After personally examining the records in camera, the trial court shall order disclosure of peace officer personnel records that are "relevant to the matter involved in the pending litigation." (Evid. Code, § 1045 subd. (a); *People v. Mooc*, 26 Cal.4th at p. 1226.)

Thus, if you diligently and properly follow the *Pitchess* process, the defendants will be forced to produce and allow a judge to examine all the relevant documents they are trying to improperly withhold. After a relevancy examination by the judge, the production of very useful and favorable documents usually occurs. In order to assure that an in camera review is ordered and documents ordered to be produced following the review are produced, you need to clearly articulate the good cause requirement. The importance of demonstrating good cause and useful tips for how to effectively establish good cause in a motor-vehicle collision case involving law enforcement is discussed in greater detail below.

Tips for showing good cause

It is of critical importance that you adequately demonstrate good cause exists for the production of the documents you are seeking. In a motor-vehicle negligence case involving a defendant officer, it is important to show that the documents sought are relevant to establish negligence, and in these types of cases, that covers a wide range of documents.

Important documents include training documents pertaining to motor vehicle operation as well as any citations, test scores, and training records.

Additionally, any prior collisions or prior investigations would all be germane to the training received by the defendant and be relevant to his knowledge of what is and is not safe driving. Lastly, the conclusions and findings of any internal investigations should be produced because the law is clear that evidence of a defendant violating internal safety policies, rules, or regulations is evidence of negligence. The seminal case on this point is *Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472, 477. A discussion of *Dillenbeck* and how to use it in your practice is outlined below.

The *Dillenbeck* effect

The *Dillenbeck* case involved an action for the wrongful death of a motorist whose automobile collided with a city police car. The collision occurred on January 22, 1962, at approximately 2 p.m., at the intersection of Wilshire Boulevard and Hobart Avenue.

Defendant police officer, responding to a police radio broadcast ordering all units to proceed to the site of a suspected bank robbery, drove east on Wilshire with both his lights and sirens on his vehicle activated and operating. The conditions were wet, and the evidence showed that, at the time of the collision, the traffic control light at the intersection showed green for the decedent and red for the police officer. Eye-witness testimony put the defendant officer traveling at approximately 40-60 mph at the time of the collision, which resulted in the death of Dillenbeck.

The jury returned a verdict in favor of the city and against the decedent's surviving heirs by a 10 to 2 vote. After the entry of judgment on the verdict and the denial of a motion for new trial, the plaintiffs appealed. "The sole dispute on appeal centers on the trial judge's refusal to allow plaintiffs to make use of either various 'Daily Training Bulletins' (hereinafter bulletins) of the Los Angeles Police Department or of former Police Chief Parker's foreword to these bulletins explaining their general limitation to 'those things which the officer must know, or should know, to be able to do a professional job.'" (*Id.*, 69 Cal.2d at pp. 479-485.) The Bulletins at issue all dealt with Los Angeles Police Department Safety Rules, i.e., the speed at which a responding officer should travel, as well as the level of due care to be employed.

In holding that the plaintiffs should have been able to introduce the City of Los Angeles Police Department Bulletins to prove negligence on the part of defendants and a lack of contributory negligence on the part of the decedent, the California Supreme Court stated the following:

> [T]he present case involves the extent to which plaintiffs can utilize the directives and statements of facts in the police department's bulletins to assist the jury in applying the *Torres* standard. 1. The bulletins should have been admitted upon the grounds (a) that they constituted evidence of the standard of due care applicable to the course of conduct of Officer Weber, and (b) that the officer's failure to follow the safety rules promulgated by his employer constituted evidence of his negligence.
>
> In the leading case of *Powell v. Pacific Electric Ry. Co*….this court held that the trial court properly allowed into evidence a train-operating rule requiring motormen to reduce their speed 'a sufficient distance in advance' of a highway crossing to allow the train 'to coast on approach to crossing, to enable full braking power being obtained in emergencies.'
>
> In *Powell* we stated: 'The rule was properly admitted in evidence as bearing on the standard of care respondent thought appropriate to insure the safety of others at its track crossings.' [citations omitted] *The safety rules of an employer are thus admissible as evidence that due care requires the course of conduct prescribed in the rule*. …
>
> Accordingly, they may well be extremely useful to the trier of fact, who, applying the amorphous standard of 'due care,' must strike a fair balance between the reduction of the risk to the public and the assurance of an effective use of an emergency vehicle. …
>
> Applying this will established legal doctrine of admissibility to the instant case, we conclude that *the bulletins at*

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> *issue contain at least two safety rules of the Los Angeles Police Department that relate to the instant factual situation* and hence should have been introduced into evidence.

(*Id.* at 477-78 (emphasis added).

What the *Dillenbeck* holding does for you is broadly construe what could qualify as a safety rule of an employer and can thus be relied upon by a plaintiff to use as evidence in proving negligence. The Supreme Court noted that "arguments grounded solely in the semantics of the word 'rule' do not furnish a sound benchmark for decision. In determining whether an employer's directive is a 'safety rule' admissible as evidence of negligence, the issue turns on whether the directive in question affords a specific indication of the employer's reconciliation of the conflict between maximum efficiency in operations and maximum safety to the public." (*Id.,* at pp. 477,478.)

The broadly construed holding as to what could be discoverable as a safety rule is what you want to bring to the judge's attention in your *Pitchess* motion, and demonstrate factually why the documents you seek in your case are covered by the *Dillenbeck* holding and must be produced.

Using *Dillenbeck* to establish good cause in your *Pitchess* motion

In *Dillenbeck* the Supreme Court concluded in regard to using safety rules to prove negligence: "In all of these cases the question of admissibility turned on whether the directive served as a safety guideline by the employer, not on whether it allowed some discretion to the employee." (*Dillenbeck,* 69 Cal.2d at p. 480.)

The Court further declared that even documents such as bulletins may also be introduced on the ground that an employee's failure to follow a safety rule promulgated by his employer, regardless of its substance, serves as evidence of negligence:

> [M]oreover, on a second, separate…theory that places no reliance on the employer's implicit resolution of the conflict between efficient operations and safety: they may be introduced on the ground that an employee's failure to follow a safety rule promulgated by his employer, regardless of its substance, serves as evidence of negligence. [Citations omitted.] *In short, the jury is entitled to conclude that the mere fact of violation of a safety rule promulgated by the employer is evidence that the employee conducted himself carelessly.* In the instant case, the jury might well have concluded, if it believed the evidence presented by plaintiffs' witnesses, that Officer Weber negligently disobeyed the city's directives as to speed through intersections and speed in excess of the posted limits.

(*Id.* at pp. 481-82, emphasis added).

Thus, when preparing a *Pitchess* motion in a motor-vehicle collision case involving a police officer, it is key to utilize *Dillenbeck* to show how all the documents you are seeking are relevant to prove the evidence of negligence. In a recent case our office handled involving a motor-vehicle collision caused by a defendant in law enforcement the defense refused to produce any of the defendant's driver training documents or records, investigation documents into the collision or any review/disciplinary action documents. Consequently, a *Pitchess* motion was filed and we argued that good cause existed for production of the documents sought under *Dillenbeck* as they went to prove defendant's negligence.

The court agreed to order an in camera review, and after review ultimately ordered the production of a number of previously withheld documents. These documents included all of the internal investigation and disciplinary hearing documents, documents which stated that the defendant peace officer was found to have violated multiple internal safety rules, was found to be at fault for the collision and had a disciplinary citation entered into her record.

Prior to the production of these documents defendants had denied liability and staunchly refused to produce this information they were holding in their possession that proved their client was at fault. In short, without having gone through this lengthy motion process, vital information necessary to help prove our client's case would never have been produced.

Not every motor-vehicle collision case with a peace officer defendant will ultimately yield a homerun like the above, but you will never get the chance to hit that pitch if you don't step up to the plate. It is important to be prepared for these situations and have in your arsenal a *Pitchess* motion ready to be finalized for filing the moment a defendant attempts to hide evidence in this manner. (Please contact the author for a sample motion template.)

Developing a well-tailored *Pitchess* motion to have in reserve for fast deployment to combat these common discovery-delaying tactics can make the difference in obtaining full compensation for your clients.

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