SECURING THE UNIVERSE OF DOCUMENTS IN CIVIL RIGHTS ACTIONS

By **Denisse O. Gastélum**

You are only as good of a civil rights practitioner as the discovery you compel. Yes, compel.

A civil rights action, in its fundamental sense, is a check on one of the most powerful institutions in our country: that is, law enforcement. Your goal as a civil rights practitioner is to protect *we the people* from abuses of power by state and local authorities. And you do this one case at a time. The biggest hurdle faced by plaintiff's attorneys in civil rights actions is securing documents to which your client is rightfully entitled. Once you pierce the "confidential" veil in discovery, the road to justice becomes a smoother and less arduous journey. Let's get you there.

STATE VS. FEDERAL COURT

One of the most highly debated topics amongst civil rights practitioners centers around one simple question: *"Where should I file my 1983 action?"* Federal court is where I was trained as a baby lawyer, and it remains my jam today. Basically, I'm Team Federal. The Federal Rules of Civil Procedure are straightforward. The District Court's local rules and the District Judge's local, local rules (i.e., standing orders) are easily accessible. And more importantly, there is no hiding the ball in discovery. Well, let me clarify. A tightly drafted stipulated protective order coupled with carefully crafted discovery and comprehensive meet and confer letters will nine out ten times get you that ball. A meticulously drafted motion to compel, by way of a joint stipulation, will ten out of ten times get you that ball in federal court. I can't say the same for state court.

If you are litigating a civil rights action, you will bring a motion to compel. That's a fact. Accept it and know that it's coming. Motions to compel and *Pitchess* motions will open doors to key discovery you need to prosecute your claims against the involved officers and the law enforcement agency, including officer disciplinary files, citizen complaints, internal affairs investigations, *Monell* related discovery for your federal claims, and negligent hiring retention and training related discovery for your state claims.

DISCOVERY WARS IN STATE COURT

In California, law enforcement agencies have a huge advantage during the discovery phase. There are numerous code sections that defense attorneys rely on to shield discovery from a plaintiff. These include the Public Safety Procedural Bill of Rights Act Officer Bill of Rights (POBRA) codified in California Government Code sections 3300-3313 and 6254, California Penal Code sections 832.5, 832.7, 832.8 892.8, 1328.5, California Evidence Code sections 1040, 1043, and 1045, and California Civil Code section 1798. Defense attorneys rely on these code sections to drape a "confidential" blanket on key documents, labeling them as privileged or not subject to disclosure without a court order.

I typically find that attorneys get confused regarding which vehicle they need to get to certain evidence. By vehicle I mean, "Do I present a CPRA request, or should I file a *Pitchess* motion or a motion to compel?" Here's the difference.

California Public Records Act Request

In 2019, Skinner's Bill (SB 1421) was passed, making certain records relating to police use of force and misconduct public under the California Public Records Act ("CPRA"); meaning, no *Pitchess* motion is required to gain access to these records. The bill applies to peace officers *and* custodial officers and amends Penal Code Section 832.7 to require disclosure of records under three circumstances: (1) in cases where an officer discharges a firearm or causes a person great bodily injury; (2) where there has been a "sustained finding" against an officer of sexual assault; or (3) where there has been a "sustained finding" against an officer of dishonesty relating either to the reporting, investigation, or prosecution of a crime or relating to another officer's misconduct. Disclosable records are those "related to" the report, investigation, or findings of such incidents, and, under Section 832.7(b)(2), includes a litany of records such as investigative reports, transcripts of interviews, autopsy reports, video evidence, disciplinary documents, and data (e.g., how many officers have had sexual assault complaints filed against them).

Following Skinner's Bill, and the amendments to the *Pitchess* statutes (i.e., sections 832.7 and 832.8), civil rights practitioners have sought the court's intervention in securing compliance with CPRA requests by filing a Complaint for Declaratory Relief and Verified Petition for Peremptory Writ of Mandate Ordering Compliance with the California Public Records Act pursuant to California Code of Civil Procedure sections 1060, 1085, *et seq.*, and California Government Code sections 6250 *et seq.* While I have been successful by simply preparing and presenting the petition to law enforcement agencies who refuse to comply with Skinner's Bill, I know quite a few attorneys who have had a superior court judge not only grant the petition, but also award attorneys' fees.

Pitchess Motion

The procedure for the discovery of a police officer's personnel records is governed by California Evidence Code section 1043, *et seq*, which was enacted to codify the California Supreme Court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. *Pitchess* involved a criminal case where the defendant César Echeverría was charged with four felony accounts for assault on four arresting deputies. (Interestingly, though not uncommon, it was Mr. Echeverria who was taken to the ICU and the deputies had no injuries.) Mr. Echeverria had one thing going for him. He hired a brilliant defense attorney by the name of Miguel Garcia, who also happens to be a beloved *Mabista*. Attorney Garcia served a subpoena seeking discovery for prior complaints concerning the deputies' propensity for violence and excessive force. The Sheriff's Department refused to produce the files. The trial court ruled that the discovery was unquestionably relevant and admissible as character evidence of the deputies' tendency to engage in violence. The Sheriff at the time was Peter Pitchess. Well, Sheriff Pitchess did not agree with the trial court and filed his petition with the Court of Appeal. The Court of Appeal agreed with the trial court's ruling but limited the discovery to complaints sustained. True to his zealous nature, Attorney Garcia then petitioned the California Supreme Court to uphold the subpoena, which it did in a 7-0 ruling. And this, folks, is how we get the *Pitchess* motion – a vehicle you need to familiarize yourself with if you file your civil rights action in state court.

The procedures which govern Pitchess motions are explained in California Evidence Code sections 1043 and 1045. You do not need to have served a request for production of documents prior to filing a Pitchess motion, but you do need to serve both the law enforcement agency and defense counsel. This is in contrast to a motion to compel,

which is governed by California Code of Civil Procedure section 2031.310, subsection (c). A motion to compel requires a preceding request for production of documents with accompanying responses and a privilege log, and service need only be made on defense counsel. The rule of thumb is if you are seeking discovery that may be contained in an officer's personnel file, you need to file a Pitchess motion. You file a motion to compel for everything else.

Although an article cannot supplant a sample *Pitchess* motion, I need to hammer a few points. You only get *one* shot with the trial judge. You need to make sure that your motion and your affidavit/declaration are on point. In a very detailed manner, you need to identify the officers and provide a description of the type of records or information you are seeking.

Now, a sigh of relief. The showing of 1043 good cause in the affidavit is measured by a relatively relaxed standard, which serves to ensure production for *in camera* review of all potentially relevant documents. The purpose of the affidavit, through a declaration of counsel based on reasonable belief and supporting documents (e.g., police report), is to persuade the trial judge that a plausible scenario of officer misconduct is one that might or could have occurred. The materiality of the requested information may be established by a reading of the police reports in conjunction with counsel's affidavit; hence, why I typically include the following exhibits to my declaration: (1) police report; (2) coroner's case report; and (3) coroner's investigative narrative.

So, you've filed the *Pitchess* motion. Now what? The trial judge will conduct an *in camera* hearing. California Evidence Code section 1045 governs the documents that may be disclosed. The types of documents you can secure via a *Pitchess* motion include prior statements by individuals who filed complaints and department records regarding previous complaints; fellow officer's complaint against the officer in question for violence in connection with a completely separate incident; and witness statements from the internal affair investigation pertaining to the incident at issue in the case. *See Pitchess, supra*, 11 Cal.3d at 537-538, *Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, *Rezek v. Superior Court* (2012) 206 Cal.App.4th 633, 643-644.

Motion to Compel

Here's where the rubber meets the road. Civil rights actions oftentimes include claims made2 against the municipality itself and/or its policymakers, high-ranking officials, and supervisors. What if you're bringing an action against a law enforcement agency that you believe has a pattern and practice of using force against people of color or not investigating claims of racially driven unlawful detentions? Your discovery plan should include a request for production of documents regarding *other* incidents involving *other* officers, not just the officer involved in your case. What do you do in state court? A trial judge is certainly not going to engage in a fishing expedition during the *in camera* hearing. You don't have the benefit of a privilege log because *Pitchess* protected files don't require defense counsel to produce one to you. What do you do?

Here is a strategy I use; it's a strategy I have formulated with other competent, seasoned civil rights practitioners. You bring both a *Pitchess* motion and a motion to compel regarding the same overlapping categories of discovery and you have them heard the same day. The memorandum of points and authorities needs to highlight the following language in California Evidence Code section 1045, subsection (c): "In determining relevance where the issue in litigation concerns the *policies or pattern of conduct of the employing agency*, the court *shall* consider whether the information sought *may* be obtained from *other* records maintained by the employing agency in the regular course of agency business which would *not* necessitate the disclosure of individual personnel records." (Emphasis added.) There is very little California case law under *Pitchess* directed to *Monell* style evidence, so you will have to rely on federal case rulings which almost always speak to *Monell* kind of broad discovery designed to prove widespread or systemic indifference to the misconduct at hand and other constitutional violations by its employees: Finding that internal affairs histories of officers who were at the scene during the alleged use of excessive force, but who were not named as defendants in civil rights and wrongful death action, were relevant to defendant city's hiring, training, supervision, and control policies, and to the non-party officers' credibility and willingness to intercede (*Hampton v. City of San Diego* (S.D. Cal. 1993)147 F.R.D. 227, 229); Internal affairs files of the named officer defendants may also be relevant "on the issues of credibility, notice to the employer, ratification by the employer and motive of the officers" (*Hampton, supra*, 147 F.R.D. at 229); Records of citizen complaints against law enforcement involving excessive force are relevant in civil rights cases, because such records may be "crucial to proving a defendant's history or pattern of such behavior" (*Soto v. City of Concord* (N.D. Cal. 1995) 162 F.R.D. 603, 620); "In order for plaintiff to prove the allegations of "failure to discipline and active encouragement of assaultive behavior", he must have an opportunity to discover and review internal investigative files and reports" (*Miller v. Pancucci* (C.D.Cal.1992) 141 F.R.D. 292, 296); "Post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but may be highly probative with respect to that inquiry" (*Henry v. Cnty. of Shasta* (9th Cir. 1997) 132 F.3d 512, 519).

My hope here is to provide you all with the tools you need to educate a state trial judge about the types of discovery that have been found to be discoverable in other civil rights actions and to be able to explain to her or his honor why this discovery speaks to the heart of your plaintiff's claims regarding pattern and practice, ratification, and notice to the law enforcement agency. Welp, good luck in state court…let's talk federal now.

DISCOVERY BATTLES IN FEDERAL COURT

Stipulated Protective Order

Your discovery battles (more like encounters) will be won not at the motion stage, but rather at the inception of the discovery phase. The more carefully crafted, narrowly tailored your stipulated protective order is, the better your odds are at securing the universe of documents. You need to draft the stipulated protective order. Yes, *you*. Sure, you'll start with the model stipulated protective order which the district judge will either have on her/his webpage or you will find on the district court's webpage. But you need to include the following two sections.

The first section lays out your privilege log parameters: (a) the title and description of the document, including the number of pages or Bates-number range; (b) the subject matter addressed in the document; (c) the identity and position of its author(s); (d) the identity and position of all addressees and recipients; (e) the date the document was prepared and, if different, the date(s) on which it was sent to or shared with persons other than its author(s); and (f) the specific basis for the claim that the document is privileged and protected. Remember: You don't know what you don't know. How are you going to be able to argue to the judge that defense counsel is "hiding" documents from you if you don't know the universe of documents? You need to be able to point to her or his honor exactly *which* document defense counsel is improperly withholding and *why* the privilege defense counsel is relying on does not apply (hence, why title, author, and recipient categories are vital).

The second section is a provision that lays out the rules to challenge confidentiality designations, placing the onus on defense counsel to file the motion for protective order within a certain amount of time

from the challenge. Why is this provision particularly important in civil rights cases? You are litigating a civil rights action wherein you are alleging civil rights violations by a police officer, a local Sheriff, and/or a municipality. The evidence you uncover by way of the discovery phase is de facto a matter of public interest and *should* be disclosed to the public. We're not talking about trade secrets here. We're talking about violations of civil liberties which you and your fellow neighbor enjoy under the United States Constitution and the California Constitution. You are vindicating a person's rights through litigation. Always remember that.

Procedurally speaking, motions to compel are governed by the relevant Federal Rule of Civil Procedure (e.g., FRCP 34 for document requests) and also by the local rule laying out the procedure for motions to compel in the district court where your case is venued. If the underlying civil rights violation occurred in Los Angeles, then you would file in the Central District of California. Should a discovery dispute arise, you would follow to a tee Local Rule 37-1. Oh, and by the way, there is no 45-day requirement to bring the motion, and scheduling informal discovery conferences with a district judge is fairly easy and common. Did I mention that I love federal practice? Just making sure.

Scope of Federal Discovery

The scope of discovery is governed by Federal Rule of Civil Procedure 26. The spirit of discovery in federal court is very liberal and is meant to encourage discovery, e.g., FRCP 26 initial and supplemental disclosures. Furthermore, District courts have broad discretion to determine relevancy for discovery purposes. *See Hallett v. Morgan* (9th Cir. 2002) 296 F.3d 732, 751.

Federal courts have also taken a bold position to draw the distinction between federal and state discovery practices, holding that California rules for discovery and privileges to be "fundamentally inconsistent" with federal law and the liberal federal policy on discovery. *Miller, supra,* 141 F.R.D. 292, 299. Also, "[s]tate privilege doctrine, whether derived from statutes or court decision, is not binding on federal courts in civil rights cases." *Breed v. U.S. Dist. Court for the N. Dist. of Cal.* (9th Cir.1976) 542 F.2d 1114, 1115. Further, and perhaps the most compelling, "[i]t *obviously would make no sense* to permit state law to determine what evidence is discoverable in cases brought pursuant to federal statutes whose central purpose is to *protect citizens from abuses of power by state and local authorities.* If state law controlled, *state authorities could effectively insulate themselves from constitutional norms simply by developing privilege doctrines that made it virtually impossible for plaintiffs to develop the kind of information they need to prosecute their federal claims." Kelly v. San Jose,* 114 F.R.D. 653, 655-656 (N.D. Cal. 1987)(emphasis added). You need to live and breathe these quotes as a federal civil rights practitioner. I personally have the *Kelly* quote framed in my office.

Common Objections

Despite federal case law being unequivocal on state-based objections (they're not binding), defense counsel will often times object to discovery requests on the basis that the documents are privileged pursuant to various sections of the California Evidence Code, Penal Code, and Government Code. You need to remind them that these objections are inapplicable to claims brought pursuant to 42 U.S.C. § 1983, and that civil rights cases brought under federal statutes, questions of privilege are resolved by federal law. *See Kerr v. United States Dist. Court for Northern Dist.* (9th Cir. 1975) 511 F.2d 192, 197.

Defense counsel will also rely on several privileges that are of no consequence in federal actions arising from civil rights violations. These privileges include "self-critical analysis" privilege and the "deliberate process" privilege. Here, you'll need to educate the defense attorney. Let them know that while you are aware that *some* federal courts allow the use of this privilege to shield from discovery of internal safety reviews in which companies evaluate the cause of a particular accident, neither the Ninth Circuit nor the United States Supreme Court recognize the self-critical analysis privilege. *See Dowling v. American Haw. Inc.* (9th Cir. 1992) 971 F.2d 423, 425, n 1. Numerous courts agree with the reasoning of the *Soto* court that "the self-critical analysis privilege should not be applied to police personnel files and records of internal affairs investigations in civil rights suits against police officers." *Soto, supra*, 162 F.R.D. 603, 620. The "deliberate process" privilege, closely related to "self-critical analysis" privilege, is also inappropriate for use in civil rights cases against police departments. The deliberate process privilege should be involved only in the context of communications designed to directly contribute to the formulation of important public policy. *See Kelly, supra,* 114 F.R.D. 653, 667-668.

Ultimately, one of the only objections that will be at issue before a district court judge is the "official information" privilege. Federal common law recognizes a qualified privilege for official information. *See Kerr, supra*, 511 F.2d 192, 198. In determining what level of protection should be afforded for this privilege, courts conduct a case by case balancing analysis in which the interests of the party seeking discovery are weighted against the interests of the governmental entity asserting the privilege. *See Kelly, supra*, 114 F.R.D. 653, 660. But don't be alarmed. In the context of civil rights suits against police departments, this balancing approach should be "moderately pre-weighed in favor of disclosure." *Kelly, supra*, 114 F.R.D 653, 661.

If the parties come to an impasse during the meet and confer efforts, and the court's intervention becomes necessary by way of a motion to compel or an informal discovery conference, be sure to request an *in camera* hearing. It is in the federal judge's discretion to conduct an *in camera* inspection if a party is able to make a factual showing sufficient to support a reasonable, good faith belief that the inspection may reveal evidence that information in the materials is not privileged. *In re Grand Jury Investigation* (9th Cir. 1992) 974 F2d 1068, 1074-1075

CONCLUSION:

The discovery phase in a civil rights action is one that commands the full attention of the civil rights practitioner. If you are a procrastinator, don't pay attention to detail or simply don't have the time, please do society a favor and do not take on civil rights actions. When a family hires you to vindicate their deceased son's rights which were violated during an unjustified and unlawful shooting by a police officer, they have placed their trust in you to do good by their son. But it goes deeper than this. How well you litigated that case and how you held the officer and the employing law enforcement agency accountable could save another son's life.

You are a truth seeker. And the only way you get to the truth is if you dig deep, and once you've dug deep, you dig deeper. Every remarkable victory I have secured on behalf of families whose loved ones have died the hands of law enforcement, whether it be a police shooting, jail suicide, or inmate violence, was a direct fruit of how hard I worked to get that discovery.

Denisse O. Gastélum *is the founder and principal trial attorney at Gastélum Law, APC, where her practice focuses primarily on civil rights/police misconduct, sexual abuse, wrongful death and catastrophic injury cases. She previously worked as a defense attorney, where she specialized in public entity defense; this experience provides her with the unique ability to analyze a case from both a defense and plaintiff's perspective. Ms. Gastélum is a proud Past President of the Mexican American Bar Association and the Latina Lawyers Bar Association, and is currently the President of California La Raza Lawyers Association.*