Denisse O. Gastélum
CASILLAS & ASSOCIATES

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Securing the universe of documents in civil-rights actions

YOU ARE ONLY AS GOOD 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 of 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 your client is rightfully entitled to. 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 on 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 also are straightforward. 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 of 10 times get you that ball. A meticulously drafted motion to compel, by way of a joint stipulation, will 10 out of 10 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; this includes 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.

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 Government Code sections 3300-3313 and 6254, Penal Code sections 832.5, 832.7, 832.8 892.8, 1328.5, Evidence Code sections 1040, 1043, and 1045, and 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 file a *Pitchess* motion or a motion to compel?" Here's the difference.

The *Pitchess* motion

The procedure for the discovery of a police officer's personnel records is governed by Evidence Code section 1043, et seq, which was enacted to codify the California Supreme Court's 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 counts for assault on four arresting deputies. (Interestingly, though not uncommon, it was Mr. Echeverría who was taken to the ICU and the deputies had no injuries.)

Mr. Echeverría had one thing going for him. He hired a brilliant defense attorney by the name of Miguel Garcia. 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 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 Code of Civil Procedure section 2031.310, subdivision (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

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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.

In the information sought section of my motions, I typically include the following language: "The information sought regarding Sheriff's Deputy John Doe (Employee No. 1234567) includes, but is not limited to, any information or complaints regarding: (1) aggressive behavior; (2) violence and/or attempted violence; (3) excessive force and/or attempted excessive force; (4) shooting and/or improper use of firearms; (5) acts indicating inaccuracy or dishonesty; (6) failure to follow department policy and/or the law; (7) improper stops/investigations, including lack of probable cause; (8) improper arrest or detainment; (9) fabrication, misrepresentation, suppression and/or embellishment of facts in reports; (10) fabrication, misrepresentation, suppression and/or embellishment of evidence; (11) false testimony; (12) morally lax character and willingness to lie; and (13) fabrication and/or false claims of probable cause."

The section describing the type of records or information I am seeking usually includes the following language: "(1) Copies of all records, reports, or investigative reports filed, pending, completed or otherwise made, and all other writings pertaining to any of the above-mentioned conduct by the identified deputies, including but not limited to documentation of citizen complaints of such conduct; (2) Names, addresses and telephone numbers of all persons who have complained about any of the above-mentioned conduct by the identified deputies; (3) Copies or transcripts of all tape-recorded or written statements by any person, including the identified deputies, which were taken in connection with any investigation initiated, filed, pending, completed or otherwise made regarding any complaint of the above- mentioned conduct; (4) Names, addresses and telephone numbers of all persons giving such statements including but not limited to, persons involved in the case at hand; (5) Information regarding any discipline that was imposed on any officer listed above in any incident involving the above-mentioned conduct, including the shooting death of [decedent's name]; (6) Any information contained in personnel or internal investigation files which indicates or identifies previous employment or experience by the identified deputies in law enforcement-related work; (7) Any and all information related to any internal affairs or other similar investigation into the incident that is the basis of this lawsuit, including but not limited to: a. names, addresses and phone numbers of people contacted or interviewed; b. statements of people contacted or interviewed; c. notes of any internal affairs or other investigators; and d. any outcomes or conclusions of any internal affairs investigations."

The standard for "showing of 1043 good cause"

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. You do not need to point to any corroboration for your client's account. You are not required to present a credible or believable factual account of, or a motive for, police misconduct. Rather, a sufficient factual allegation in a *Pitchess* motion may consist of a denial of the facts asserted in the police report. (*Uybungco v. Superior Court* (2008) 163 Cal.App.4th 1043, 1048-1049.) The upshot is that 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) incident report (i.e., 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. Evidence Code section 1045 governs the documents that may be disclosed. Section 1045 provides that once the low threshold for good cause is established, "the court shall examine the information [contained in the personnel files] in chambers" to determine whether "that information is relevant to the subject matter involved in the pending litigation. The types of documents you can secure via a *Pitches*s 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 "workplace violence" in connection with a completely separate incident; and witness statements from the internal affairs 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.)

For civil-rights actions involving sexual assault by an officer, you need not file a *Pitchess* motion. With the passage of Skinner's Bill (SB 1421) in 2019, complaints related to sexual misconduct by officers are not subject to *Pitchess* procedures. Pursuant to the California Public Request Act, you can present a request to the law-enforcement agency not only for data (e.g., how many officers have had sexual assault complaints filed against them) but also citizen complaints. Because of the passage of Skinner's Bill, some counties, including San Diego County, have internal-affairs investigations and citizen-complaint files regarding sexual assault by officers available on their website.

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Motion to compel

Here's where the rubber meets the road. Civil-rights actions often include claims made as against the municipality itself and/or its policy makers, 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 Evidence Code section 1045, subdivision (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 the 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); further, because performance evaluations are conducted on a routine basis, "the absence of materials documenting officer misconduct would tend to suggest the officer in question performed adequately and in accord with department policies." (*Stewart v. City of San Diego* (S.D.Cal. Nov. 24, 2010, No. 09cv844-IEG (WMc)) 2010 U.S.Dist.LEXIS 124581).)

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. This is the language I include: "If a party withholds information that is responsive to a discovery request by claiming that it is privileged or otherwise protected from discovery, that party shall promptly prepare and provide a privilege log that is sufficiently detailed and informative for the opposing party to assess whether a document's designation as privileged is justified. (See Fed. R. Civ. Proc. 26(b)(5).) The privilege log shall set forth the privilege relied upon and specify separately for each document or for each category of similarly situated documents: (a) the title and description of the document, including 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. Communications involving counsel that post-date the filing of the complaint need not be placed on a privilege log."

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

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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).

Challenging confidentiality designations

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. This is the language I include: "The Challenging Party shall initiate the dispute resolution process under Local Rule 37.1 et seq. Failing informal resolution between parties, the Designating Party may file and serve a Motion for a Protective Order with the Court strictly pursuant to Local Rule 37, including the Joint Stipulation Procedure. The parties agree that if the Motion for Protective Order is filed within 21 days of the written challenge (subject to extension upon agreement of the Parties), the Material will retain its original designation until the Court rules on the Motion for a Protective Order. If the Designating Party does not file a motion within the 21-day period following a challenge, the material is no longer designated as CONFIDENTIAL INFORMATION for purposes of this Stipulation, but that change in designation does not bar the Producing Party from subsequently filing a motion for a protective order."

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 to 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 if the discovery disputes arose from a request for production of documents) 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 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.)

The scope of discovery is governed by Federal Rule of Civil Procedure 26. Rule 26 states that the "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

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 defense objections

Despite federal case law being unequivocal on state-based objections (they're not binding), defense counsel will often 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 title 42 U.S. Code section 1983, and that in 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; *Heathman v. United States Dist. Court for Cent. Dist.* (9th Cir. 1974) 503 F.2d 1032, 1034.)

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 "deliberative process"

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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 U.S. Supreme Court recognize the self-critical analysis privilege. (See *Dowling v. American Haw. Inc*. (9th Cir. 1992) 971 F.2d 423, 425, n 1; *Soto v. City of Concord* (N.D. Cal. 1995) 162 F.R.D. 603, 611-612.) 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 "deliberative process" privilege, closely related to "self-critical analysis" privilege, is also inappropriate for use in civil-rights cases against police departments. The deliberative-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 ["So limited, this privilege would offer no protection at all to most of the kinds of information police departments routinely generate"]; *Soto, supra*, 162 F.R.D. 603, 611-612.)

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 weighed against the interests of the governmental entity asserting the privilege. (See *Kelly, supra*, 114 F.R.D. 653, 660; see also *Miller, supra,* 141 F.R.D. 292, 300; *Hampton*, *supra*, 147 F.R.D. 227, 230-231.) 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; see *Soto, supra*, 162 F.R.D. 603.)

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.)

Discovery must command your full attention

The discovery phase in a civil-rights action is one that must command the full attention of a 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 right 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. The only way you get to the truth is to dig deep. And once you've dug deep, to dig deeper. Every remarkable victory I have secured on behalf of families whose loved ones have died at the hands of law enforcement, whether it be a police shooting, jail suicide, or inmate violence, was the direct fruit of how hard I worked to get that discovery.

Denisse O. Gastélum is an attorney at Casillas & Associates, *where she practices law in the areas of civil rights and catastrophic injury, representing plaintiffs in state and federal courts throughout California. Ms. Gastélum is a Past President of the Mexican American Bar Association and the Latina Lawyers Bar Association. She currently serves on the Board of Directors of the American Civil Liberties Union of Southern California, California La Raza Lawyers Association, Consumers Attorneys Association of Los Angeles, and the Consumer Attorneys of California. She received her B.A. at UCLA and her J.D. from Loyola Law School.*