Overcoming *Pitchess* in workplace discrimination suits

A look at the body of law governing the workplace culture within law enforcement

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In the wake of the murder of George Floyd and the Black Lives Matter protests of 2020, law enforcement reform is an urgent public policy objective. Reform efforts have properly focused on interactions between police and civilians, which too often are marred by abuse of authority and deadly use of force. Less attention, however, has been paid to the body of law governing the workplace culture within law enforcement, which has contributed to discriminatory and abusive policing. Workplace anti-discrimination lawsuits are vital to rooting out unlawful discrimination within law enforcement, which in turn will allow its ranks to better reflect and serve all communities.

While the California Legislature recently expanded the reach of the Fair Employment and Housing Act (FEHA),[1] one doctrine applicable only in the law enforcement context stands in the way of change. California's judicially created and later codified "*Pitchess*" doctrine strictly limits discovery and disclosure of peace officer personnel records. These limits historically have been among the most

restrictive of any state in the nation.[2] In the last three years, the California Legislature has passed bills giving the public greater access to certain records. These records include, among other things, discharge of a firearm, serious uses of force, and incidents involving sustained findings of sexual assault against the public, dishonesty in reporting or investigating a crime, and prejudice or discrimination. This legislation, while significant, does not go far enough, especially because it mostly relates to *sustained findings of officer misconduct*, which are rare, and because agencies may draw out the process of disclosure. These issues, as well as aggressive record-purging policies, dilute the Legislature's recent reforms. In the FEHA context, despite reforms, the *Pitchess* doctrine may gut a plaintiff's efforts to prove discrimination occurred by blocking access to important evidence. This article describes how the *Pitchess* doctrine evolved to its current dimensions and offers strategies to limit its negative effects on an FEHA plaintiff's case.

History and overview of the *Pitchess* doctrine

In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, the California Supreme Court recognized a criminal defendant's right to discover evidence from a police officer's personnel file. Following the decision, allegations surfaced of law enforcement engaging in discovery abuses, including shredding documents to keep information out of the hands of litigants.[4] In 1978, the Legislature addressed the problem of police file destruction by, perversely, enacting laws making it harder to discover officer personnel files in civil and criminal cases.[5] The result was to erect an obstacle course of barriers to litigants challenging pervasive patterns of discrimination and abuse within law enforcement.

The 1978 legislative scheme codified what came to be known as the "*Pitchess* doctrine" through enactment of Penal Code sections 832.7 and 832.8, as well as Evidence Code sections 1043 through 1045.[6] Penal Code section 832.8 broadly defines peace officer "personnel records" as any file maintained under an officer's name by the officer's employer containing records relating to the following: personal data; medical history; election of employee benefits; employee advancement, appraisal, or discipline; complaints or investigations of complaints pertaining to the manner in which the employee performed his or her duties; and "[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy."[7] The 1978 legislation stood the original *Pitchess* decision on its head, making secrecy the default rule and allowing access to officer personnel records only in certain specific situations enumerated in the statutes.[8] If none of these exceptions applies, a party seeking access to such records or information – which in the civil context is the plaintiff – faces an uphill and time-consuming battle that proceeds in two steps.

First, the plaintiff must file a motion.[9] The motion must include a description of the types of records or information sought; a showing of good cause, supported by an affidavit, that the records or information sought are material to the subject matter of the pending litigation; and a statement of reasonable belief that the defendant law enforcement agency has the records or information from the records.[10] The affidavit must make a plausible factual showing of materiality.[11] In assessing whether the threshold for good cause has been met, the judge considers whether the evidence sought is admissible or may lead to discovery of admissible evidence.[12]

Second, upon a showing of good cause and materiality, the defendant's custodian of records must bring to court all records potentially relevant to the plaintiff's motion.[13] The judge then reviews the records in camera to determine what, if anything, will be disclosed.[14] The defendant's custodian of records and counsel generally participate in the in camera proceedings.[15] The plaintiff and plaintiff's counsel do not.[16] The proceedings are recorded, but transcripts are confidential and may be available to the plaintiff on appeal only.[17] It may take weeks or even months for the judge to review the records, particularly if they are voluminous, and to issue a ruling. If the judge determines that all or portions of the records must be disclosed, they typically are produced to the plaintiff under a protective order.[18]

Challenges with navigating the *Pitchess* doctrine in the FEHA context

Fundamental flaws in the statutory version of the *Pitchess* doctrine have made it the subject of much debate and criticism in the criminal context, where it originated and most often arises. Little attention has been paid to application of the doctrine in civil cases, much less in FEHA cases seeking to hold law enforcement agencies accountable for unlawful discrimination. In fact, there is only one reported decision from a California court addressing the *Pitchess* doctrine in an FEHA case. In *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, a former police officer brought an action against the City of Whittier alleging sex discrimination, harassment, and retaliation in violation of the FEHA. After the police chief testified at trial that he was unaware of a perceived lack of opportunity for women at the police department, plaintiff's counsel impeached him with material from a memorandum he wrote, which addressed an unrelated investigation and contained a statement contradicting his testimony. Plaintiff had not filed a *Pitchess* motion to obtain the memorandum. The Fourth District Appellate Court concluded that the trial court did not err in allowing plaintiff to use the memorandum because the information used to impeach the police chief was based on an officer's perception but did not pertain to the performance of his or her duties, and thus, did not fall within the statutory definition of "personnel records."

Although *Zanone* acknowledged limits to the statutory definition of "personnel records," the Court emphasized the "great[] protection" needed by officers who have been the subject of complaints about their alleged misconduct. The case did not address the *Pitchess* process, which plaintiff never invoked, nor whether a party who legitimately obtains *Pitchess*-protected records without first filing a *Pitchess* motion is precluded from using that evidence at trial.

The statutory *Pitchess* doctrine has serious, negative implications for FEHA plaintiffs. "*Pitchess* objections,"[19] which often are sustained, can be raised in response to written discovery as well as any deposition questions regarding personnel issues that an officer considers private. This broad protection from disclosure of information regarding an employee's on-the-job performance and behaviors disadvantages the plaintiff in a manner unheard of in the typical FEHA case.

Employee personnel records are essential discovery in cases brought under the FEHA. Oftentimes, these records are a plaintiff's only source of information about a discriminator's work performance reviews and evaluations, promotions and demotions, workers' compensation claims, complaints, investigations, and disciplinary history. An absence of documented investigations or discipline in a discriminator's personnel records may indicate that an employer failed to prevent or address discrimination. "Me too" evidence from the personnel records of other employees who claimed to have been harassed or discriminated against can make or break a case. In non-law enforcement contexts, such records routinely are produced.

The *Pitchess* doctrine, however, poses significant and sometimes insurmountable barriers to an FEHA plaintiff obtaining such records. For example, the Penal Code section 823.8 definition of peace officer "personnel records" is expansive. The definition includes a catch-all category for "[a]ny other information" that, if disclosed, would "constitute an unwarranted invasion of personal privacy." Records maintained outside of what typically is considered a personnel file, as well as information derived from such records, are covered. The definition also includes complaints, information relating to investigations, and information about events an officer perceived pertaining to the performance of his or her duties.[20] The statutory *Pitchess* doctrine therefore is far-reaching, and despite statutory carve-outs for records related to officer uses of force or sustained findings of misconduct, significant and relevant information remains out of reach to plaintiffs without motion practice.

During the "good cause" phase of the *Pitchess* process, the plaintiff faces additional challenges. For there to be good cause, the plaintiff's discovery request must be tailored to the specific officer misconduct alleged.[21] The plaintiff must identify the information sought with enough specificity to establish good cause and guide the judge's in camera review. Failure to satisfy these requirements may result in denial of the motion or the judge glossing over relevant information during review. The plaintiff must carry this burden despite, in all likelihood, knowing next to nothing about the contents of *Pitchess*-protected personnel records. The *Pitchess* doctrine thus presents a Catch22: The moving party must identify discoverable information with particularity before it even knows what the information is or whether it exists.

In FEHA cases, where the scope of relevant discovery is broad, it can be near-impossible for the plaintiff to identify and establish good cause for the disclosure of all *Pitchess*-protected evidence to which it is entitled. For example, a *Pitchess* motion seeking "me too" evidence from across a law enforcement agency is likely to be denied as overbroad or speculative, but one seeking evidence from the personnel records of only the discriminators may overlook evidence from the personnel files of other employees. Although California courts have suggested that the good-cause requirement can be met relatively easily, there are no reported cases applying this principle in the FEHA context. In any event, it is an additional burden on the plaintiff that is not present in other discovery contexts.

If the moving party succeeds in establishing good cause, he or she faces more hurdles. During in camera proceedings, the defendant law enforcement agency provides the judge with potentially relevant records and may address any questions or issues raised by the court. In a criminal case, neither party is present for this portion of the hearing. In a FEHA case, however, the defendant agency producing the records meets privately with the judge. The in camera proceeding thus is transformed into a forum for ex parte communications. Courts could use other tools, like protective orders, to protect information from broad dissemination while also ensuring impartiality during these proceedings. Instead, the *Pitchess* doctrine paves the way for what is an exceedingly rare event in civil proceedings – allowing the judge, who hears only the defendant's side of the story while the plaintiff has been expelled from the courtroom, to be persuaded on an issue of significance to the case. There is little the FEHA plaintiff can do about an unfavorable outcome besides seek extraordinary writ relief or wait to raise the issue on appeal. Neither path is likely to result in reversal of the trial judge's decision given the deferential standard of review.

Recommendations to plaintiffs' attorneys to overcome *Pitchess* hurdles

By enacting unfair and unnecessary barriers to discovery and disclosure of officer personnel records, the statutory *Pitchess* doctrine is incompatible with the FEHA's purpose of preventing workplace discrimination. There are steps plaintiff's

counsel can take, however, to minimize the negative effect the doctrine may have on a client's case.

At the outset of the case, plaintiff's counsel should develop a robust discovery plan that accounts for *Pitchess*. Counsel should expect that the defendant law enforcement agency will assert *Pitchess* objections at every juncture, in response to both written and oral discovery. Thus, counsel should begin discovery as early as possible. Counsel should also identify early on every officer with a role in the case and be prepared to file a *Pitchess* motion as soon as there is sufficient basis to do so. Information obtained through an early *Pitchess* motion may be useful to guide later fact discovery or expert analysis.

Counsel also should be mindful that law enforcement agencies typically have aggressive document-purging policies. Plaintiff's counsel should send a thorough preservation letter as soon as the case is contemplated. Even then, the longer one waits to file a *Pitchess* motion, the more likely it is that relevant records may be purged. Given that the affidavit submitted in support of a *Pitchess* motion may include statements made on information and belief,[22] and the relatively relaxed good-cause standard, counsel may be able to file a successful *Pitchess* motion early in the discovery process – and may gain a significant strategic advantage by doing so. On the other hand, counsel should not file a *Pitchess* motion unless and until it can articulate to the judge precisely what records are sought and explain their relevance. If *Pitchess* objections are raised at a deposition, the deposition should be left open and a *Pitchess* motion should be filed promptly. While expensive and burdensome, this approach is necessary in this context.

The *Pitchess* process also presents plaintiff's counsel with an opportunity to educate the judge about the case and draw out helpful information. At the hearing on the motion, counsel should explain in detail the facts and themes in the case and anticipate arguments that may be made in camera outside the presence of plaintiff's counsel. And while the judge is not required to communicate the reasoning behind any decisions made at a *Pitchess* hearing, if appropriate, counsel should consider asking the judge to identify the custodian of records, list the types and quantities of records reviewed in camera, and provide a general overview of records not ordered disclosed. Whether or not such a request is granted, this will create a robust record for appeal.

In addition, counsel should be prepared to defend against a so-called "reverse *Pitchess* motion." This is a *Pitchess* motion brought by the defendant seeking permission to disclose information from the personnel records of current and former employees it deems to have crossed the "thin blue line" by testifying for the plaintiff. Such a motion should be opposed as it serves to intimidate witnesses by allowing their colleagues to share negative information from their personnel files.

Plaintiff's counsel also should be creative in its approach to discovery so as to avoid getting bogged down by endless *Pitchess* motions that ultimately may yield little evidence. Written discovery and deposition questions should be framed to avoid *Pitchess* objections if possible. For example, in addition to asking for information related to an employee's performance appraisals, which fall squarely within the statutory definition of "personnel records," counsel could ask about the employee's reputation in the workplace and whether supervisors ever discussed their opinions of the employee, which arguably call for information outside that definition. Counsel also should use the California Public Records Act – which, if employed properly, provides a back door into law enforcement agencies that is not available if the defendant is from the private sector – to obtain evidence of the defendant's past settlements, emails that the discriminators may have sent about the plaintiff, and any records made available through carve-outs in the *Pitchess* statutes, including records related to sustained findings of dishonesty or discrimination.

Conclusion

The statutory *Pitchess* doctrine makes FEHA litigation against law enforcement agencies difficult and expensive. The doctrine could be improved if the California Legislature made peace officer "personnel records" more available to the public, including by narrowing the statutory definition of "personnel records" or allowing for counsel on both sides to participate in *Pitchess* proceedings under safeguard of a protective order. Until the Legislature overhauls the *Pitchess* doctrine, however, plaintiffs' lawyers will have to go the extra mile in litigation aimed at holding law enforcement agencies accountable for discrimination in the workplace.

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Endnotes

[1] Gov. Code, § 12960, subd. (d), as amended by Stats. 2019, ch. 709 (A.B. 9).
[2] Lorelei Laird, "California relaxes one of the nation's most restrictive laws on police personnel records," *ABA Journal* (Feb. 28, 2019, 11:45 a.m.), https://www.abajournal.com/magazine/article/california-police-personnel-records; Joel Rubin, "This L.A. sheriff's deputy was a pariah in federal court. But his secrets were safe with the state," *Los Angeles Times* (Aug. 10, 2018, 3:00 a.m.), https://www.latimes.com/local/lanow/la-me-police-misconduct-secrecy-federal-20180810-html-story.html.)
[3] Pen. Code, § 832.7-8, as amended by Stats. 2018, ch. 988 (S.B. 1421), Stats. 2021, ch. 402 (S.B. 16).
[4] *San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189.
[5] *Id*. at pp. 189-190.
[6] *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 82.
[7] Pen. Code, § 832.8.
[8] Pen. Code, § 832.7.
[9] Evid. Code, § 1043, subd. (a).
[10] Evid. Code, § 1043 subd. (b).
[11] *Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 655.
[12] *Id*. at p. 658.
[13] Evid. Code, § 1045, subd. (b); *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086.
[14] Evid. Code, § 1045, subd. (b).
[15] *Ibid*.
[16] *Ibid*.
[17] *People v. Rodriguez* (2011) 193 Cal.App.4th 360, 366.
[18] Evid. Code, § 1045, subd. (e).
[19] The label "*Pitchess* objection" further illustrates the through-the-looking-glass nature of the current doctrine, where objections designed to maintain secrecy of records are named after the landmark case that was supposed to open up access to such records.
[20] *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 188-89.
[21] *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020.
[22] *Riske*, 6 Cal.App.5th at p. 655.
[23] *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 89.