

RESOLUTION 16-10-2017

DIGEST

Police Discovery: Expansion of *Pitchess* Motion Disclosures

Amends Evidence Code section 1045 to expand *Pitchess/Brady* discovery in criminal cases.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Evidence Code section 1045 to expand *Pitchess/Brady* discovery in criminal cases. This resolution should be approved in principle because it streamlines both prosecution and defense access to pertinent information.

A police officer's discipline history is contained within his or her personnel file. This history consists of citizen complaints, investigation of complaints, or discipline imposed as a result of the investigations. Generally, the personnel file is confidential. However, it can be accessed through a *Pitchess* motion if the information is determined relevant to litigation. (Evid. Code, §§ 1040, 1043, 1045.) This usually occurs in the criminal context, when a defendant wants to demonstrate an officer's malfeasance in the defendant's case. But even where a *Pitchess* motion is granted, the defendant gets only the contact information of the complainants, instead of the actual complaint or relevant statements. This judicially-created rule hobbles the criminal defendant, and is not applied to *Pitchess* motions filed in civil litigation. Denying criminal defendants access to civilian witness statements impedes the search for the truth and causes delay while the defense tries to discover the relevant information.

Judicial interpretation of Evidence Code section 1045 hampers the prosecution as well. Pursuant to *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, the prosecution must file a *Pitchess* motion in tandem with the defense in order to obtain the same information. The resolution ensures that the prosecution receives a copy of any *Pitchess* disclosures provided to the defense. This would help the prosecution comply with its *Brady* obligations, and obviate the need to file duplicate *Pitchess* motions. The prosecution has a duty under *Brady* to disclose information that tends to help the defense; relevant police misconduct often falls in that category. This amendment simplifies the *Pitchess* process for the prosecution and the defense and promotes judicial efficiency by not having to file and have the trial court hear a duplicate *Pitchess* motion. Defense resources are conserved as well by not having to find potential witnesses and obtain their statements.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Evidence Code section 1045 to read as follows:

1 § 1045

2 (a) Nothing in this article shall be construed to affect the right of access to records of
3 complaints, or investigations of complaints, or discipline imposed as a result of those
4 investigations, concerning an event or transaction in which the peace officer or custodial officer,
5 as defined in Section 831.5 of the Penal Code, participated, or which he or she perceived, and
6 pertaining to the manner in which he or she performed his or her duties, provided that
7 information is relevant to the subject matter involved in the pending litigation.

8 (1) If the court permits the disclosure or discovery of any peace or custodial officer
9 records, and the relevant information involves one or more civilian witnesses, the disclosure or
10 discovery shall include the name, contact information, and all relevant statements of such
11 persons, subject to any protective order.

12 (2) In any criminal proceeding where the court has permitted the disclosure or discovery
13 of peace or custodial officer records, the prosecuting agency shall receive a copy of any relevant
14 information provided, subject to any protective order.

15 (b) In determining relevance, the court shall examine the information in chambers in
16 conformity with Section 915, and shall exclude from disclosure:

17 (1) Information consisting of complaints concerning conduct occurring more than five
18 years before the event or transaction that is the subject of the litigation in aid of which discovery
19 or disclosure is sought.

20 (2) In any criminal proceeding the conclusions of any officer investigating a complaint
21 filed pursuant to Section 832.5 of the Penal Code.

22 (3) Facts sought to be disclosed that are so remote as to make disclosure of little or no
23 practical benefit.

24 (c) In determining relevance where the issue in litigation concerns the policies or pattern
25 of conduct of the employing agency, the court shall consider whether the information sought
26 may be obtained from other records maintained by the employing agency in the regular course of
27 agency business which would not necessitate the disclosure of individual personnel records.

28 (d) Upon motion seasonably made by the governmental agency which has custody or
29 control of the records to be examined or by the officer whose records are sought, and upon good
30 cause showing the necessity thereof, the court may make any order which justice requires to
31 protect the officer or agency from unnecessary annoyance, embarrassment or oppression.

32 (e) The court shall, in any case or proceeding permitting the disclosure or discovery of
33 any peace or custodial officer records requested pursuant to Section 1043, order that the records
34 disclosed or discovered may not be used for any purpose other than a court proceeding pursuant
35 to applicable law.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Nick Stewart-Oaten, David Bigeleisen, Jodi Taksar, Vivian McPayah-
Obiamalu, Johnny O’Kane, Nicholas Daum, Richard Zitrin, James Brosnahan, Mary Vail, Alan
Crivaro

STATEMENT OF REASONS

The Problem: Under existing law, an officer's personnel records are protected from disclosure or discovery, except as permitted after a *Pitchess* motion. (See Cal. Pen. Code, §§ 832.5, 832.7, 832.8; Cal. Evid. Code, §§ 1043-1047.) "'Personnel records' is broadly defined and includes an officer's personal data and employment history, as well as the officer's record of discipline and investigations of complaints." (*Rosales v. City of L.A.* (2000) 82 Cal.App.4th 419, 424.)

A party seeking such evidence "must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. ... If the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that information falling within the statutorily defined standards of relevance." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.)

In criminal cases, "courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead ... that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) "On those occasions when that information proves insufficient, either because a witness does not remember the earlier events or the witness cannot be located, a supplemental *Pitchess* motion may be filed and the statements of the witnesses may be disclosed to the defendant." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 757.) "This judicially created rule seeks to ensure a defendant will not rely solely on prosecution investigation efforts and imposes a further safeguard to protect officer privacy where the relevance of the information sought is minimal and the officer's privacy concerns are substantial." (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1090 (holding that this rule is inapplicable in civil cases).)

However, the statutory scheme does not limit a litigant's access to relevant information. (Cal. Evid. Code, § 1045(a).) Second, this judicially-created rule applies only to criminal defendants, even though their rights and interests should outweigh those of civil plaintiffs. Third, an officer's privacy concerns regarding civilian witness statements is minimal, since no reasonable expectation of privacy exists for acts performed in public or in plain view of a third party. Additionally, denying access to civilian witness statements impedes the search for truth, risks a *Brady* violation, and causes delay while the defense tries to discover the relevant information, which, if unsuccessful, permits disclosure of the statements anyway.

The Solution: This resolution (1) invalidates a judicially-created rule that denies criminal defendants access to civilian witness statements in an officer's personnel records when good cause exists for disclosure, (2) ensures reciprocal discovery (Cal. Pen. Code, § 1054.3(a)), and (3) facilitates the prosecuting agency's duty to disclose the existence of *Pitchess/Brady* material in other cases (see *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696).

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Michael Fern, Los Angeles County District Attorney's Office, 211 W. Temple St., Ste. 1000, Los Angeles, CA 90012, (213) 537-4529, sclawyer@gmail.com.

RESPONSIBLE FLOOR DELEGATE: Michael Fern