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Officer needs assistance

A PRIMER ON REPRESENTING FIRST RESPONDERS IN PERSONAL-INJURY ACTIONS

First responders are a unique breed of client that come with a host of unusual rules, issues, and considerations. A thorough understanding of the complex circumstances that may arise in a first-responder case will position you to achieve the best result for your first-responder client.

The "Firefighter's Rule"

The threshold issue you will need to consider when evaluating a potential first-responder case is whether the Firefighter's Rule applies. The Firefighter's Rule – which, despite the name, applies to peace officers, firefighters, and emergency medical personnel – is a specific application of the assumption-of-risk doctrine. First responders assume the risk of occupational hazards, so are not owed the same duty of care that would normally apply in cases involving civilians. (See *Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 70.) Hence, firefighters injured while battling a forest fire have no cause of action against a defendant whose passive negligence caused the fire.

The Rule also applies to peace officers, firefighters, and emergency medical personnel who are off duty, but who are performing the duties or acts that their normal job entails. (See, e.g., *Hodges v. Yarian* (1997) 53 Cal.App.4th 973 [Firefighter's Rule precluded off-duty sheriff deputy who confronted a burglar from bringing negligence claims against building owner and manager].)

Peace officers, firefighters, and emergency medical personnel however, "[do] not assume every risk of his or her occupation." (*Neighbarger, supra,* 8 Cal.4th at 538.) Civil Code section 1714.9, subdivision (a) sets forth broad exceptions to the Rule and allows recovery for injury occasioned by a defendant's *willful acts* or *want of ordinary care or skill* in the following situations:

- Where the conduct causing the injury occurs *after* the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel.
- Where the conduct-causing injury violates a statute, ordinance, or regulation, and was itself not the event that precipitated either the response or presence of the first responder.
- Where the conduct causing the injury was intended to injure the first responder.
- Where the conduct-causing the injury is arson as defined by Penal Code section 451.

Another carve-out to the Rule is the "independent cause exception," i.e., an independent negligent act that did not necessitate the first responder's presence. For example, the Rule did not bar a premise-liability claim by a firefighter who slipped on a defective staircase while performing a routine, non-emergency building inspection. (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658.)

Representing sworn law-enforcement officers

Sworn or non-sworn?

When interviewing or performing intake on your new law enforcement officer (LEO) clients, it is important to find immediately whether they are *sworn* or *unsworn*. Knowing your client's status will carry enormous implications for how you respond to discovery.

Your client is sworn if they (1) graduated from a law-enforcement academy, (2) were issued a badge for official identification, (3) have the power to make arrests for violations of the law, and (4) are authorized to carry a firearm in the performance of their duties.

Non-sworn personnel such as parking-enforcement officers or animal-control officers have limited peace-officer power. They do not have the power to arrest or to enforce laws.

If your client works in custody for the Sheriff's Department, be sure to ask whether they are a "custody deputy" or "custody assistant": a custody deputy is sworn, but a custody assistant is not, although a custody assistant performs many of the same duties as a custody deputy. Also keep in mind that non-sworn positions may be filled by sworn personnel.

Penal Code section 830, et seq., identifies positions in various state and county agencies, including public universities, that are sworn versus unsworn.

Pitchess motions

If your client is sworn, the significant protections provided by *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and the "*Pitchess* laws" – Penal Code sections 832.5, 832.7 and 832.8, and Evidence Code section 1043, et seq. – will impact discovery. These statutes and the mandatory processes laid out within them apply regardless of whether your client is on or off duty and they supersede normal discovery procedures. (See *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 400; *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607.)

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Pitchess most often arises in criminal cases: to challenge the charges against him or her, the criminal defendant will move, via a "*Pitchess* motion," for the production of the personnel records and/or information of the law enforcement officer(s) involved in the defendant's arrest or in the investigation of the case.

In the *Pitchess* case, Caesar Echevarria was charged with felony battery of four Los Angeles County sheriff's deputies. Notably, Echevarria ended up in the ICU while the deputies suffered no injuries. Echevarria asserted that he acted in self-defense in response to the deputies' use of excessive force.

To bolster that defense, Echevarria's attorney requested the deputies' personnel records to see if there were complaints by the public about the deputies using excessive force in other incidents. The Sheriff's Department, led by Sheriff Peter J. Pitchess, refused to produce the records. Echeverria's counsel successfully moved to compel production, and the prosecution was ordered to obtain the records from the Sheriff's Department. The Sheriff's Department again refused to produce the records, and a subpoena duces tecum was issued. The Sheriff's Department refused to produce yet again, moved to quash the subpoena, lost the motion, and sought a writ of mandate.

This history is important because the California Supreme Court used the case to highlight the vast differences between discovery in criminal cases versus discovery in civil cases. Sheriff Pitchess argued, among other things, that the affidavits in support of the subpoena duces tecum were insufficient because they failed to demonstrate "good cause" with the specificity required by Code of Civil Procedure sections 1985 and 2036. The Supreme Court firmly shot down this argument: "[This] contention is premised on the erroneous assumption that the statutory provisions governing discovery in civil actions apply to criminal proceedings ....[I]t has long been held that civil discovery procedure has no relevance to criminal prosecutions." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.)

The Supreme Court held that, for a criminal case, the affidavits were "clearly sufficient to justify discovery" – they "demonstrat[ed] that the requested information will facilitate the ascertainment of the facts and a fair trial." (*Id*. at 536-537.) Further, the information sought could not be readily obtained in any other way," the requested information "may have considerable significance to the preparation of [the defendant's] defense, and the documents have been requested with adequate specificity to preclude the possibility that defendant is engaging in a 'fishing expedition.'" (*Id*. at 537-538.)

In 1978, *Pitchess* was codified into law, in Penal Code sections 832.5, 832.7 and 832.8 and Evidence Code section 1043. Together, they establish the rules for obtaining personnel records of sworn law enforcement personnel, as well as the protections precluding discovery of that information.

How *Pitchess* plays out in a civil case

If your plaintiff is a sworn first responder, you will likely find the defense issuing subpoenas for your client's personnel records from their employer. Immediately object – and, if there is a subrogation case being pursued by your client's employer, contact the subrogation attorney to make sure they do so as well. (Alternatively, if there is a subrogation case pending, the defense may serve requests for production on the subrogation claimant to obtain your client's personnel records.)

The defense will (or won't) meet and confer with you about your objections – and then the defense will file a "*Pitchess* motion." The motion will be fatally defective unless each of the strict requirements of Evidence Code section 1043 are met in full:

• The motion must be served on the "governmental agency that has custody and control of the records. If your client's employer uses a third-party administrator (TPA) to maintain custody and control of the requested records, then the motion must be served on the TPA, and not just on your client's employer. The only exceptions to this rule are where the moving party shows good cause for noncompliance or where the governmental agency waives the hearing. Both circumstances are exceedingly rare. If the motion is not properly served on the correct governmental agency, then the court cannot hold any *Pitchess* hearing at all. (See *City and County of San Francisco v. Superior Court* (1993) 21 Cal.App.4th 1031.)

• Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency that has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

• A description of the type of records or information sought.

• Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records. For example, it is not enough for the defense to assert that liability is in dispute. Their affidavit must detail a "plausible scenario that might or could have occurred," that is, a scenario that "asserts specific misconduct that is both internally consistent and supports the proposed defense." (See *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70.) The defense "must also show how the information sought could lead to or be evidence potentially admissible at trial." (*Ibid.*)

• *If* the court finds that all these requirements have been met, the court must conduct an *in camera* review of the records to determine whether the records are sufficiently relevant to the case to be produced to the requesting party. (Evid. Code § 1045, subd. (b).) Certain items must be excluded, including "[f]acts

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sought to be disclosed that are so remote as to make disclosure of little or no practical benefit." (*Ibid.*) Where the policies or pattern of conduct of your client's employing agency are at issue, the court's relevance analysis must consider whether the information can be obtained in other ways "which would not necessitate the disclosure of individual personnel records." (See Evid. Code, § 1045, subd. (c).)

Once the relevance analysis is complete, the court "may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." (Evid. Code, § 1045, subd. (d).) The court may also order that the records not be used for any purpose other than a court proceeding. (See Evid. Code, § 1045, subd. (e).) You should be sure to request in your opposition to the *Pitchess* motion and at the hearing that the court make any disclosure subject to a protective order.

What *Pitchess* protects – and what it does not

Pitchess protects your client's entire personnel file, with limited exceptions. *Pitchess* also protects all information that *would* be found in your client's personnel file, even if the information can be found elsewhere, as well. For example, a peace officer is not required to give protected information in response to a question at deposition, or in response to written discovery. (See, e.g., *City of San Diego v. Superior Court* (1981) 136 Cal.App.3d 236.)

Penal Code section 832.7 protects peace-officer personnel records from disclosure in criminal and civil cases, except where the records are sought by discovery pursuant to Evidence Code sections 1043 and 1046. Penal Code section 832.8, subdivision (a)(1)-(6) sets forth the different categories of protected peace officer personnel information as follows:

- Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
- Medical history.
- Election of employee benefits.
- Employee advancement, appraisal, or discipline.
- Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.
- Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

It is important to note, however, that medical history that would ordinarily be discoverable under Evidence Code section 996 is not considered protected peace-officer personnel information. (See Evid. Code, § 1044.) Even so, the protections in this statutory scheme are powerful – so powerful that attempts to discover protected personnel-file information via any means other than those set forth in Evidence Code section 1043 are void. Anything else – including the normal processes set out in the Discovery Act – is unauthorized. (*County of L.A. v. Superior Court* (1990) 219 Cal.App.3d 1605.)

Representing firefighters

If your client is a firefighter, your case analysis is essentially the same, with the exception of the discovery protections that apply to law-enforcement officers. *Pitchess* does not apply to firefighters. However, certain positions related to fire investigation and prevention/suppression are sworn and, therefore, subject to *Pitchess* – e.g., state fire marshals (Pen. Code, § 830.3, subd. (e)), arson investigators (Penal Code, § 830.37, subd. (a)), and voluntary fire wardens of the Department of Forestry and Fire Protection (Penal Code, § 830.37, subd. (c)).

"Code 3" cases

A high percentage of first-responder cases involve injuries sustained during a "Code 3" response. Code 3 is the designation for "rolling lights and sirens" – i.e., an emergency response, usually circumstances that represent an immediate danger to officer or public safety and that require an expedited priority response with lights and sirens. The California Vehicle Code exempts drivers of an authorized emergency vehicle during a Code 3 response from many of the usual rules of the road – e.g., observing traffic lights or stop signs or the right of way at intersections, rules against passing and/or overtaking other vehicles, driving on the correct side of the road, etc. (See, e.g., Veh. Code, §§ 21350, et seq.; 21650, et seq.; 21800, et seq.; 21950, et seq.; 22100, et seq.; 22348, et seq.; 22450, et seq.; 22500, et seq.; 22650, et seq.; 38305, et seq.; and 38312, et seq.)

Vehicle Code section 165 defines an "authorized emergency vehicle," and you should verify whether the type of vehicle involved in the accident in your case is included in the list.

Whether the exemption applies depends not on whether there is an actual emergency occurring, but "on the nature of the call received and the situation as presented to the mind of the driver." (See *Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 258-259.)

Vehicle Code section 21055 identifies the specific conditions necessary for the exemption to apply:

- The vehicle must be driven "in response to an emergency call or while engaged in operations or is being used in the immediate pursuit of an actual or suspected violator of the law or is responding to, but nor returning from a fire alarm…." (Veh. Code, § 21055, subd. (a).)
- The driver has the vehicle's lights and sirens activated. Only one siren and one lighted red lamp visible from the front are necessary. (Veh. Code, § 21055, sund. (b).)

The exemption provided by section 21055 does not apply if the driver of the emergency vehicle fails to activate their light or their siren. (*Monroy,* 164 Cal.App.4th at p. 258.)

Further, section 21055 "does not relieve the driver of a vehicle from the duty to drive with due regard for the safety of all persons using the highway,

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nor protect him from the consequences of an arbitrary exercise of the privileges granted in that section." (Veh. Code, § 21056.) An "arbitrary exercise of the privileges granted in [section 21055]" means that drivers must still "exercise that degree of care which, under all circumstances would not impose upon others an unreasonable risk of harm" – i.e., "willful misconduct" or "an act performed either with knowledge that serious injury to another will probably result or with wanton and reckless disregard of possible consequences." (*Torres v. City of Los Angeles* (1962) 58 Cal.2d 35). Examples of willful misconduct during Code 3 responses have included entering an intersection at full speed, despite knowing that a failure to slow would cause a collision with a motorist present in the intersection. (*Goldstein v. Rogers* (1949) 93 Cal.App.2d 201), and failing to maintain sufficient control over the vehicle. (*Laundry Services v. City of Los Angeles* (1952) 109 Cal.App.2d 703.)

Seatbelt cases

In both Code 3 and non-Code 3 cases, you'll often find that your first-responder client was not wearing a seatbelt. The normal seatbelt requirement, as set forth in Vehicle Code section 27315, does not apply to public employees in an authorized emergency vehicle or to passengers in the backseat of an emergency vehicle being operated by a public employee, "unless required by the agency employing the public employee." (Veh. Code, § 27315, subd. (g).)

Ask your client or the subrogation attorney to obtain their agency's policies and procedures regarding seatbelt use.

Workers' compensation

Your client will likely have started a workers' compensation claim before consulting with you. And, odds are, this will not have been the first workers' compensation claim your client has filed. First responders are frequently injured on the job and often have multiple workers' compensation claims. Make sure you run your client's name through the Electronic Adjudication Management System ("EAMS") of the Division of Workers' Compensation (https://www.dir.ca.gov/dwc/EAMS/EAMS_PublicInformationSearch.htm).

Remember that causation in workers' compensation is vastly different than causation in a third-party personal-injury case. In workers' compensation, the basic questions are: Did something bad happen at work or while your client was on duty or in the course and scope of their employment? Did the "something bad" cause injury? Can a medical expert say, to a reasonable degree of medical probability, that at least 1% of the claimed injury is because of the "something bad" that happened while your client was working? If the answer is "yes" to those questions, there's a potential workers' compensation case. Remember: if your client is injured on the job, their supervisor is required to file a "First Report of Injury" within 24 hours.

Proving causation in a third-party personal-injury case is a much more rigorous endeavor. Carefully review your client's workers' compensation records so that you can determine which of those treaters will be most helpful and most able to prove causation to the degree necessary to successfully prosecute the personal injury case.

You should coordinate with your client's workers' compensation counsel and make sure both of you remain updated on the status of your respective cases. You will also want to obtain the Qualified and/or Agreed Medical Examiner's Report(s) that evaluate your client's medical condition.

Labor Code § 3853 notice

Once you file the complaint, you must provide notice of the third-party action to the workers' compensation insurer – and, likewise, if your client's employer decides to file a third-party claim for subrogation, they must provide the same notice to your client: "If either the employee or the employer brings an action against such third person, he shall forthwith give to the other a copy of the complaint by personal service or certified mail. Proof of such service shall be filed in such action." (Lab. Code, § 3853.)

Regardless of who files the third-party action first, the other side will normally file a "complaint in intervention." You might not know that the employer has already filed their subrogation complaint, so you file your client's complaint independently. That's fine, just get the two cases related and consolidated as soon as possible.

Be aware: If the employer has filed first, they will have only filed for subrogation related to your client's medical treatment, temporary disability payments, and permanent disability award. The employer will not – and cannot – make a claim for your client's past and future pain and suffering, future medical treatment, past loss of earnings beyond regular salary, or future loss of earnings/earning capacity. When you file your complaint in intervention, you must plead those – just as you would in any personal-injury case.

The right to intervene is unconditional. (*Mar v. Sakti Internat. Corp.* (1992) 9 Cap.App.4th 1780 [holding that Code Civ. Proc., § 387 and Lab. Code, § 3853 grant an unconditional right to intervene].) The deadline to intervene set by Labor Code section 3853 is "any time before trial on the facts." Still, try to get your complaint filed as soon as possible so that you can participate fully and diligently in discovery.

What is recoverable through workers' compensation?

A big personal-injury case may well generate a big workers' compensation lien that may have to be repaid upon resolution of the case. Here are the most common benefits payable to an injured first responder through workers' compensation:

Medical treatment

Your client's medical treatment for their injuries – until they are deemed permanent and stationary – are covered through the workers' compensation case. To be "permanent and stationary" means

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maximum medical improvement – and that they are now ready to be seen by a Qualified or Agreed Medical Examiner and get their disability rating. Additionally, the first responder will likely receive an award of lifetime medical care for their injury(ies).

Labor Code § 4850 pay

First responders who are injured on duty are eligible for Labor Code section 4850 pay – i.e., their full base salary – for up to one year (except for police officers and firefighters who are employees of the City and County of San Francisco). (See Lab. Code, § 4850, subd. (f).) Whether the first responder is sworn or unsworn does not matter; all of the categories of first responders eligible for this pay are identified in the statute.

Understandably, most first responder clients get very anxious about their section 4850 pay running out – with many making the sometimes unwise decision to return to work before they are fully healed or ready. Know that, after section 4850 pay is over, your client may be eligible for "state rate" disability – which would pay 66% of their gross salary for up to an additional year.

In some cases, there may be additional benefits recovered through workers' compensation. This is another reason why it's so important to remain in communication with the workers' compensation attorney and to understand what is recoverable through the workers' compensation system.

Loss of earnings

Your first-responder client's loss of earnings will be an important aspect of their case. Aside from their regular salary, you'll want to be sure to consider the following major facets of earnings:

Overtime

Most law-enforcement and firefighting agencies are understaffed, and personnel tend to work considerable overtime. As mentioned above, overtime is not recoverable through workers' compensation, but it absolutely is through your third-party case. Get your client's records for the 3-5 years before the injury incident and work out their average monthly overtime. It will likely be substantial. Make sure you include it in your response to Form Interrogatories 8.4, 8.7, and 8.8. And make sure to give those records to your forensic economist.

Bonus categories

First responders' pay often includes special compensation or premium pay based on various skills, education, or assignments – e.g., marksmanship qualification, being multilingual, or serving on a specialized squad or team. On a paycheck per paycheck basis, this premium pay might not seem like a lot, but it adds up. Be sure to account for it in your loss-of-earnings calculations.

Your client's paycheck will show the bonuses categories for which they are being paid. CalPERS also lists a number of special compensation categories (https://www.calpers.ca.gov/page/employers/mycalpers-technical-requirements/special-compensation-reportability-table). Each agency is different, though. For example, there is an ongoing case against the Redlands Police Department for bilingual bonus pay: The plaintiff is fighting to be compensated for his fluency in Hindi, Punjabi, and Urdu, while the Redlands Police Department states that it provides discretionary bilingual bonus pay only for Spanish and Farsi speakers.

Pension and other benefits

Carefully review the health and pension benefits provided to your client through their employment – they have to be included in your forensic economist's calculations for loss of earnings. For example, if your client retires early as a result of their injuries, their pension may be substantially damaged – thus creating another potential and very significant item of damage in the third-party case.

Disability retirement: Working with your client's pension attorney

If your client has been injured so badly that they are seeking a disability retirement, you must carefully coordinate with their pension attorney. There's virtually nothing that your third-party work-up can do to hurt the pension case – but a lack of coordination can cause the pension case to negatively impact your third-party case. Keeping abreast of the medical evaluations in the pension case is crucial. You don't want to find out that your client is being retired for a bum knee while you argue loss of earning capacity in the third-party case based on a serious spine injury.

Unlike workers' compensation, there is no easy-to-access public records system to show applications for a medical retirement or the status of such a request.

When you are retained by your client, be sure to ask whether they have already started the disability retirement process. If they have not, you'll want to calendar a check-in call with your client about that every few months so that you do not miss this important development. Once they start the disability retirement process, you'll want to regularly check in with the pension attorney and your client about the status of the pension case.

Witnesses – Colleagues can help and hurt

Always talk to your client about their partner or the other members of their team. They can be invaluable sources of information, who can help you tell a powerful story.

Whether your client is a law-enforcement officer or a firefighter, and no matter whether they were on duty or off duty at the time of the injury incident, make sure that you request, obtain, and listen to and watch every minute of all body-worn video (BWV) from any responding law-enforcement agency. Your client will likely be in that video and so will the comments and discussions of the responding officers.

Sometimes this will be good for your case: a chaotic scene, your client's injuries on gory display, evidence to impeach a lying defendant. But sometimes it goes in the opposite direction. A bad joke or snarky comment by one of your client's colleagues can send the case spinning off

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in a frustrating and damaging direction. Whatever it is, you want to know, so you can come up with the best strategy to deal with it.

If there is a subrogation case, the subrogation attorney should be able to help you rally your first responder client's colleagues to act as witnesses. Remember: your interests and those of the subrogation claimant are aligned in the third-party case. While you cannot help prepare these witnesses for deposition or trial, you can certainly strategize with the subrogation attorney about how best to utilize these witnesses.

Conclusion

First-responder cases are inherently complicated. Your awareness of the intricacies involved in these cases – and knowing to keep an eye out for specific additional issues – will help you avoid certain common pitfalls and maximize your client's recovery.

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