Discovery Practice Pointers

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Documents of Subject Incident

- Police Report
- CAD call report
- 911 call audio and text
- Dispatch audio
- Photographs
- Body worn camera footage
- In-car camera footage
- Autopsy report
- Medical records

Documents from Department

- Policies
- Practices
- Training materials
- Reports of prior contacts with subjects
- Reports of prior use of similar force
- Police officer personnel files
- Police officer training history
- Police officer internal affairs file
- Police officer discipline history

Production of Documents

- FRCP 26(a)(1) – Initial Disclosures

"All documents…that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses…"

Scope of Discovery

FRCP 26(b)(1)

"Parties may contain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…"

Law Enforcement Privilege

- Protects from disclosure the following types of information:
  - Pertaining to law enforcement techniques and procedures.
  - That would undermine the confidentiality of sources.
  - That would endanger witnesses and law enforcement personnel.
  - That would endanger the privacy of individuals involved in an investigation.
  - Information that would otherwise interfere with an investigation.
- Protects the law enforcement agency's ability to conduct future investigations.

Law Enforcement Privilege

- Party asserting privilege bears burden of showing that it applies to the documents in question.
- Qualified privilege, not absolute.
- Presumption against lifting privilege.
- To rebut presumption:

  1. Show that the lawsuit is non-frivolous and brought in good faith.
  2. Information is not available through other means.
  3. There is a compelling need for the information sought.

- Court balances the public interest in disclosure against the need of the particular litigant to the information.

Law Enforcement Privilege

- U.S. Supreme Court has not recognized or rejected the law enforcement privilege.
- Same for 9th Circuit.

Official Information Privilege

- Federal common law recognizes a qualified privilege for official information.
- Government personnel files are considered official information.
- Generally covers disclosure of police material and personnel file.

Official Information Privilege

- Party asserting privilege has burden of making "substantial threshold showing" of a specific harm connected to the disclosure of a specific document.
- Party asserting privilege must object to discovery request by invoking privilege by name.
- AND support objection with declaration or affidavit sworn by an agency official.

Official Information Privilege

- Declaration must include:
  - Agency maintains the material confidentially.
  - Statement that the official has personally reviewed the material in question.
  - Specific governmental or privacy interest threatened by disclosure.
  - Description of why a protective order would be insufficient.
  - Projection of the amount of harm that would be done if disclosure were made.
- If threshold showing made then Court balances interests.

Protective Orders

- FRCP 26(c) provides that a court may limit discovery to protect from annoyance, oppression or undue burden or expense.
- Absent a court order it is generally established that documents and things produced in discovery are public.
- Where a party seeks an order protecting information produced in discovery from public disclosure, a good cause standard applies.
- Good cause requires that the party seeking the protective order show that specific prejudice or harm will result if no protective order is granted.