Arbitrators may decide Pitchess motions

A recent California Supreme Court decision raises questions about the extent to which nonjudicial officers should decide disclosure questions. In *Riverside County Sheriff's Department v. Stiglitz*, the court ruled that an arbitrator deciding an appeal from disciplinary action against a peace officer could inspect confidential personnel records of other peace officers and determine whether they should be disclosed in the arbitration proceeding.

The statutes in question establish a qualified privilege for peace officer personnel records and prescribe a procedure for determining whether they should be disclosed, commonly called *Pitchess* rights. Under the facts of *Pitchess v. Superior Court*, Peter Pitchess was the sheriff of Los Angeles County from 1958 to 1982, and the petitioner in a case that established standards for disclosure of peace officer records before enactment of the current statutory scheme. Under Evidence Code sections 1043–1047 and Penal Code section 832.5, a person seeking protected records must make a written motion with notice to the agency employing the person whose records are sought. If the motion establishes good cause, the "court" examines the individual records to determine which of them meet the stringent standards of relevance set out in Evidence Code section 1045.

The question in *Riverside County Sheriff's Department* was whether the legislature's use of the word "court" in the provision that provided for in camera review limited such review to judicial officers. There, SCOCA decided that nonjudicial officers could conduct in camera review because other portions of the statutory scheme made it clear that applications for disclosure could be directed to decisionmakers other than judicial officers. "[A]llowing administrative hearing officers to determine *Pitchess* motions in this context furthers the goals of the POBRA [Public Safety Officers Procedural Bill of Rights Act] and maintains the balance between an officer's interest in privacy and a litigant's interest in discovery."

Justice Werdegar, joined by Justice Baxter, disagreed. Her dissenting opinion argued that the legislature meant to limit in camera review to judicial officers when it used

the word "court." Justice Werdegar stated: "The unfortunate consequence of the majority opinion is this. Often, the person presiding over an administrative hearing need not be a lawyer and could be whomever the parties choose; the nonparty peace officer will have no input. On the say-so of such a person, without judicial oversight or any guarantee of a protective order, the peace officer's formerly confidential records may be opened to inspection."

SCOCA has answered the question of who should decide privilege issues differently in other contexts. For example, in *Costco Wholesale Corp. v. Superior Court*, SCOCA ruled that *even* judicial officers may not require disclosure of attorney-client communications to determine what material is protected: "The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material." The *Costco* result did rest in part on Evidence Code section 915, which generally bars disclosure of material confidential communications for the purpose of determining whether the attorney-client privilege has attached.

Although an arbitrator has authority to issue subpoenas and to decide discovery disputes, SCOCA has ruled that an arbitrator may not finally determine a nonparty's objections to subpoenas. *Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* An agreement to arbitrate gives an arbitrator authority under Code of Civil Procedure section 1283.05 to resolve discovery disputes. However, because a nonparty has not agreed to arbitrate, it maintains a right to de novo review in a trial court of any order requiring it to make disclosures. That holds true even though section 1283.05 makes an arbitrator's discovery order "as conclusive, final, and enforceable as an arbitration award on the merits." Judicial review of an arbitration award is limited to the six narrow statutory grounds in section 1286.2, and, where unwaivable statutory rights are involved, courts apply scrutiny "sufficient to ensure that arbitrators comply with the requirements of the statute at issue."

In *Riverside County Sheriff's Department*, SCOCA ruled that a nonjudicial officer could administer a *Pitchess* in camera procedure, even though the statute plainly states that a "court" should do so. In *Berglund*, SCOCA ruled that courts should review an arbitrator's discovery order by a more stringent standard than the one applied to arbitration awards, even though the statute stated that discovery orders

are just as conclusive, final, and enforceable as arbitration awards. Therefore, although each decision on authority of nonjudicial officers to decide disclosure issues purports to be based on the applicable statutory language, one may suspect there are policy issues lurking in the background affecting the approach to that language.

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Calvin House is an experienced California lawyer, with 24 civil jury trials and over 100 appellate matters. He has argued three cases in the California Supreme Court (County of Los Angeles v. Superior Court, 21 Cal.4th 292, 981 P.2d 68 (1999); City of Barstow v. Mojave Water Agency, 23 Cal.4th 1224, 5 P.3d 853 (2000) and County of Los Angeles v. Los Angeles County Emp. Relations Com., 56 Cal. 4th 905, 301 P.3d 1102 (2013).

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