HOW CONFIDENT SHOULD YOU BE ABOUT STATE CONFIDENTIALITY?

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One topic frequently dominates the first conversation that state enforcers have with counsel for a witness in an antitrust investigation – confidentiality. This is true whether the witness is a potential target of the investigation, a potential victim of alleged anticompetitive behavior, or merely a possible fact witness. Whether we enforcers want nothing more than an informal oral interview, or are demanding compliance under oath with a detailed set of document production requests pursuant to a civil investigative demand ("CID"), the witness's counsel will want to determine the extent to which we can maintain confidentiality and to discuss safeguards that may prevent disclosures of sensitive information. This desire for an assurance of confidentiality often extends beyond the traditional category of trade secrets and can include the very fact that a state enforcer is in communication with the witness, especially where the witness has a justifiable fear of retaliation by the target of an investigation.

The conversation goes something like this: The good news is that state enforcers take witnesses' confidentiality concerns very seriously, work with witnesses (even potential targets) to protect confidentiality, and have a solid overall record of not unintentionally disclosing confidential information. The bad news is that the laws governing the various aspects of confidentiality vary widely from state to state, and the few cases that provide any guidance are state-specific and of little general applicability. Given those realities, the conversation usually turns to what the enforcing state can – and cannot – agree to do in order to provide a level of comfort about confidentiality to the witness.

When discussing confidentiality, it is important to distinguish between unintentional and intentional disclosures. Unintentional disclosures include both accidental disclosures and disclosures that a state is required to make as a result of efforts by third parties using subpoenas or requests made under state freedom of information ("FOIA") laws. Intentional disclosures include disclosures that a state may make to further its investigation, including providing information to other enforcers, experts, and witnesses.

State antitrust investigations frequently do not occur in a vacuum. When a state is acting alone, a witness's counsel may be able to evaluate confidentiality concerns by looking at the specific laws and practices of the investigating state. However, when federal enforcers are investigating the same allegations, there are specific processes by which state enforcers share information with their federal counterparts. Sometimes there are private plaintiff class action lawsuits, and there are unique issues that arise out of the possibility that state enforcers and private plaintiffs' counsel will need to share information. Most importantly, states frequently enforce antitrust laws through formal multistate enforcement efforts ("Multistates"), in which anything from a handful of jurisdictions to over fifty[2] may participate. Information sharing is essential to an efficient Multistate, and it is that relationship which is the starting point for any useful conversation about confidentiality.

2 For simplicity, the District of Columbia, Puerto Rico, Guam, and American Samoa are referred to as "states" in this article.

For purposes of this article, we will assume the existence of a Multistate and that the witness is a business entity but not a target of the investigation.[3] Multistates are usually structured with a written common interest agreement and frequently a separate Multistate Confidentiality Agreement ("MCA"). The MCA typically specifies how documents will be shared among the participating states, what to do in the event of a FOIA request, the conditions under which experts will be allowed to access documents, and what happens to the documents at the conclusion of the litigation. Depending upon the nature of the investigation and the witness, states' counsel may be willing to share the MCA with a witness's counsel. However, the MCA may need to be redacted to protect the integrity of the investigation or because of state-specific laws that may prevent disclosing the target of an investigation at a preliminary stage.

Informal oral interviews rarely raise significant confidentiality concerns. Most FOIA laws are limited to the production of "records" that already exist and do not cover unrecorded oral communications. In other words, a FOIA request that asks a state to provide a summary of what a witness said in an interview is normally improper. Even if the states' attorneys take notes of the interview, those are typically covered by the work product doctrine.[4] Thus, it is unlikely that the specifics of an oral interview will be subject to unintentional disclosure.

However, this is a good time to emphasize Rule #1 of confidentiality: Do not send states unsolicited documents that you want to keep confidential. Even if your client is anxious to provide documentation showing that it is the victim of anticompetitive conduct, first discuss the issue with states' counsel. If you simply email a PowerPoint or evidentiary materials prior to an interview, those unsolicited documents may become public records. The Multistate will usually want to issue a CID or something functionally similar, such as an investigative subpoena. This may be done before or after an informal "no documents" interview. In some situations, specific jurisdictions may offer a witness a confidentiality agreement in lieu of or in addition to a CID.

Oral interviews also illustrate Rule #2 of confidentiality: States are generally willing to try to protect the confidentiality of documents and specific facts (such as clear trade secrets) in them, but often cannot protect mental impressions that might lead a target to infer with whom a Multistate has been communicating. The best way to avoid a problem of that sort is for the witness to discuss it with states' counsel. For example, we often use informal interviews to learn about an industry's structure and terms of art, which allows for more accurate CID drafting. However, if there are certain references that a witness is concerned about us using, we may be willing to use more generic language in a CID directed to a target.

CIDs are the starting point for protecting the confidentiality of witness documents in state antitrust investigations. Most often, they are issued after the formation of a Multistate.[5] The standard for issuing a CID varies but the usual requirement is reasonable cause to believe that a witness has information that may be relevant to a state's civil antitrust investigation. If a CID is challenged in court the issuing state may be required to show that there is a good faith basis for believing that a violation of antitrust law may have occurred. This is lower than a probable cause standard, which makes sense given that a core purpose behind the CID process is to assist a state in determining whether antitrust enforcement is warranted. This is particularly true when an antitrust investigation starts with allegations made by a purported victim that is a competitor of the purported violator. Absent a robust CID process, states would often need to file antitrust suits based more upon information and belief rather than well-developed evidence. CIDs can provide the facts and evidence that are required for an adequately detailed complaint. As such, CIDs not only allow states to do substantial pre-filing discovery, they also help to protect entities from being sued if they are accused of anticompetitive behavior without a factual basis.

State CID statutes (or statutes governing functionally similar processes such as investigative subpoenas) vary widely. Multistates frequently consider the particularities of various statutes before deciding which state or states will issue CIDs, although other considerations also come into play. Those may include the primary locations of witnesses, whether particular states have expertise with regard to particular issues in an investigation, or even questions of resource allocation. One advantage to the responding witness of working with a Multistate is that with the exception of "me too CIDs" the witness will usually avoid the problem of having to respond to separate CIDs from numerous state enforcers.

3 The matters discussed in this article generally do apply to targets of investigations, but additional issues can arise with respect to targets. Those issues, such as problems of parallel civil and criminal proceedings and the right against self-incrimination, are outside the scope of this article.

4 A few states have broad FOIA laws that could be construed to require production of such materials. Enforcers in those states generally attempt to limit their notetaking accordingly.

5 Sometimes a state initiates an antitrust investigation on its own, or issues CIDs to obtain specific information before forming a formal Multistate.

CIDs are a form of compulsory process, even though they are typically issued by the state attorney general's office without prior court involvement. Most state CID statutes do not contain explicit limitations as to the permissible scope of inquiry. Those that do generally apply the same limitations to a CID as would apply to a subpoena duces tecum issued post-filing by a court.[6] Enforcement mechanisms differ, but may provide that the witness seeking to quash a CID must file an action in court within 20 or 30 days.[7] Conversely, states can typically enforce their CIDs through a court order if the witness does not respond.[8] Failure to provide information requested pursuant to a CID can be a crime, particularly after a court orders compliance.[9]

Absent a CID, information obtained by a state during an investigation is much more likely to be subject to FOIA disclosure. FOIA statutes vary widely in breadth, and even when the language of FOIA statutes seems similar, the interpretation of that language may differ by state.[10] Furthermore, there is little case law guidance in many states. FOIA statutes contain some level of protection for trade secrets in the majority of states, although the mechanism for obtaining such protection varies widely.[11] In general, FOIA laws provide protection for disclosure of documents during the course of a government investigation, but absent some other exemption from FOIA disclosure those documents may become publicly available once the investigation ends.[12]

Most enforcers would agree that a court issued protective order protects documents from FOIA requests, particularly documents that are appropriately designated as "confidential" because they contain trade secrets or other sensitive information. Thus, it is a common Multistate practice to work with defense counsel to obtain protective orders. However, such orders normally only issue after a complaint is filed,[13] they may not retroactively protect documents provided to the states during an investigation, and there are states where even a court order may not exempt all types of documents from FOIA disclosure.

Given the inherent uncertainties over the scope of FOIA law, the interplay between CID statutes and FOIA statutes is complicated and varies widely by state. In some states there is clear statutory authority that information obtained via a CID is not public,[14] occasionally supported by case law.[15] In other states the situation is less clear. There are states where information obtained directly by the state may be deemed subject to disclosure under that state's FOIA laws, but where information obtained from another state under an MCA may be protected from FOIA disclosure. Statutes allowing sharing of investigatory materials between states frequently allow or require the receiving state to apply the same confidentiality protections as the originating state.[16] Multistates therefore try to issue CIDs from "strong protection" states and share with "broad disclosure" states to the extent that the shared documents are likely to be subject to the original acquiring state's confidentiality provisions.

Collaboration with federal investigators raise additional issues. When allegations of anticompetitive behavior or merger reviews are of interest to both federal and state enforcers, we sometimes end up conducting a joint investigation. In other instances, we conduct parallel investigations that may be coordinated to a greater or lesser degree. We most frequently work with either the United States Department of Justice or the Federal Trade Commission, each of which have their own protocols for sharing information. The details of those procedures are beyond the scope of this article, but what is relevant is that federal agencies typically require state-specific consents from witnesses to share information that they obtained. This means that even though there is a Multistate, if you represent a witness who produced documents to the DOJ you may

6 See, e.g. 740 Ill. Comp. Stat. Ann. 10/7.2; Neb. Rev. Stat. § 59-1611(3)(b); Wash. Rev. Code Ann. § 19.86.110.

7 See, e.g. Ohio Rev. Code Ann. § 1331.16(I); Utah Code § 76-10-3107(2); Was. Rev. Code Ann. § 19.86.110(9).

8 See, e.g. Conn. Gen. Stat. Ann. § 35-42(f); 740 Ill. Comp. State. Ann. 10/7.6.; N.C. Gen. Stat. Ann. § 75-10; Tenn. Code Ann. § 8-6-404.

9 See, e.g. N.C. Gen. Stat. Ann. § 75-12.

10 These variations are the primary reason that I have avoided trying to give statistical breakdowns of FOIA laws and have instead used general phrases. My impressions are based both on my own experiences dealing with these issues for many years, and conversations with my colleagues in other states about these topics.

11 For example, the party providing the trade secret material may be required to identify the specific documents that contain trade secrets and to explain why they should be kept confidential. A general designation of all documents produced as "confidential trade secrets" may not suffice. *See, e.g.* Utah Code §63G-3-309(1)(a)(i).

12 *Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372 (UT 2008).

13 An exception is where a court proceeding has been initiated to either quash, modify, or enforce a CID. The court may issue a protective order as part of the proceeding, or as part of the relief in appropriate cases.

14 See, e.g. Conn. Gen. Stat. Ann. §35-42(c)(1), (c)(2), (e); Tenn. Code Ann. §8-6-407; Utah Code §63G-2-201(3)(b).

15 See, e.g. *Comm'r of Emergency Servs. & Pub. Prot. V. Freedom of Info. Comm'n*, 330 Conn. 372, 390 (2018).

16 This authority may be found in a state's FOIA statute rather than specifically in an antitrust statute. See, e.g. Utah Code §63G-2-206.

end up needing to give dozens of consents. Unfortunately, those consents may implicate the vagaries of individual state FOIA statutes previously mentioned. Thus, there may be a need to separately negotiate and customize at least some of the consents to accommodate those differences.

Witnesses sometimes receive "me too" CIDs from states. Those CIDs follow two basic patterns. The first is the "me too" CID seeking information that the witness is providing or has previously provided to a federal enforcer. To an extent, this can mitigate the need for the individual confidentiality waivers discussed above. Indeed, states sometimes issue such "me too" CIDs where negotiations over the waivers between the states and the witness have stalled . The second common reason for a "me too" CID is that some states believe that documents received pursuant to their own CID are better protected from unintentional disclosure than documents received only pursuant to an MCA.

Whatever the reason for issuing it, once a state receives information from a "me too" CID, that information is subject to the state's own CID statute as well as any sharing provisions under state law or under an MCA. Fortunately for the witness's counsel, it is rare for a state that issues a "me too" CID to get involved in negotiations regarding the scope of the original document production, the adequacy of that production, or the mechanics of that production. One exception sometimes arises in the context of "me too" CIDs for documents produced to a federal agency, when the witness tries to remove the control numbers from the prior federal production. The "me too" state will push back strongly when that occurs and will require that the production includes the same control numbers as on the original version. Having the same control numbers allows the state and federal enforcers to communicate efficiently about the same evidence. When the "me too" CID is issued by a state to provide additional FOIA protection for a CID issued by another state in a Multistate this usually isn't an issue because the "me too" state typically either does not require a physical second production or just asks to be copied on the production to the lead state that issued the original CID.

Some states can enter into witness confidentiality agreements ("WCAs") in addition to CIDs. Such agreements may be explicitly provided for by statute.[17] More frequently, authority to enter into a WCA may be implied by a statutory provision (e.g. that a witness may consent to certain disclosures of CID materials),[18] or may be a matter of practice (perhaps under the theory that because such agreements are not prohibited by statute they are permitted).

A primary reason for using WCAs is that they are more flexible than CIDs. For example, a WCA can contain provisions providing notice to a witness before any documents are disclosed pursuant to a FOIA request, a right that a witness may not have by statute when it produces documents in response to a CID. Similarly, if a Multistate issues a CID to Witness "A," and in response obtains documents in which Witness "B" has a legitimate privacy interest, a WCA with Witness "B" can give some protections that otherwise would not be available to Witness "B."

Another common reason for using WCAs early in an investigation is to get the information needed to draft cogent CIDs and to quickly obtain key information from non-hostile witnesses. This two-step process can benefit the witness as well as the Multistate because the resulting CID may be better focused and much easier for the witness to comply with.

Another use of WCAs segues us from the question of limiting unintentional state disclosures of confidential information to the question of negotiating intentional disclosures that a state may wish to make of CID responsive materials. A state issuing a CID for a Multistate will naturally need to be able to share it with other participating states. Likewise, the Multistate's experts will need access to the materials. Sometimes there is a need to share information obtained from one witness with another witness, for example when the witnesses fundamentally disagree about what happened at a meeting where both were present. A WCA can help to resolve some concerns that a witness may have about how the Multistate will use information provided by the witness.

There is wide variation among the states as to what uses of materials obtained by CID are explicitly permitted or prohibited. Most statutes permit sharing with other state and federal enforcers regardless of the consent of the witness. Some statutes require notice to the witness prior to such sharing,[19] and may require that the receiving enforcing entity agrees to keep the information confidential.[20] The question of whether a state can share information with experts or fact witnesses is even more variable. Under some statutes the witness must consent to such disclosures, while other statutes seem to give the enforcing state an unlimited right to use the information for purposes of the investigation as the state see

17 See, e.g. Utah Code § 76-10-3107(8)(a).

18 See, e.g. 740 Ill. Comp. Stat. Ann 10/7.2(2); Ohio Rev. Code Ann. § 1331.16(L); Wash. Rev. Code Ann. § 19.86.110(7).

19 See, e.g. Ohio Rev. Code Ann. § 1331.16(L)(requiring "reasonable notice to the person who provided the material"); Utah Code § 76-10-3107(9)(c)(ii)(requiring notice "20 days prior to disclosure").

20 See, e.g. Neb. Rev. Stat. § 59-1611(6); Utah Code § 76-10-3107(9)(c)(ii)(A).

fit. Some statutes are arguably unclear or contain language that is subject to multiple interpretations with respect to how CID materials can be used. Rarely are these issues resolved by judicial decisions. Given all of the possible permutations of law and legal, it benefits both the witness and the Multistate to resolve these issues through negotiation.

Thus, the third and final rule of confidentiality: Be reasonable in negotiating WCAs or terms for CIDs. Generally, state enforcers will be sympathetic to the legitimate, specifically articulated concerns of witnesses, and will negotiate appropriately tailored restrictions on the use of highly confidential information. However, states will push back hard against what appears to be overbroad "belt and suspender" prohibitions. That is particularly true where the language proposed by the witness's counsel is seen by the Multistate as materially hampering the investigation.

It is helpful for private counsel to understand how carefully Multistates handle the materials that they receive from witnesses and other sources. Antitrust investigations invariably involve large volumes of documents and other data from numerous sources, including records obtained directly from witnesses, from government agencies, and from public sources. This gathering process can result in millions of pages of materials which need to be reviewed and evaluated for relevance and evidentiary value. Multistate investigations normally use a single cloud-based document review platform to store all of the documents gathered in a given investigation. The review platform is typically "hosted" by a single state, and only specific attorneys and limited support staff who are working on that particular Multistate investigation have access to the database.[21]

Thus, the norm is that "sharing documents" in a Multistate does not mean that the witness's whole document production is going to be dumped into servers under the control of dozens of different state governments around the country. The exact review platform and the hosting state can vary from case to case, but the software normally uses artificial intelligence to help reviewers hone in on documents that have a higher probability of having evidentiary value. Document review platforms have mechanisms for organizing relevant documents topically and for building case outlines, so there isn't a need for each state to download even the subset of the produced documents that are likely to become evidence in a case. Only a small percentage of those potentially probative documents are likely to ever be copied outside the document review system, and then only for specific purposes. The most common reasons why a document produced by a witness may be copied outside the case management system include:

- Use as actual evidence at trial, in pleadings in filed cases or motions concerning enforcement of CIDs, and other court proceedings (which are frequently filed under seal or in a redacted version, depending upon the matter at issue).

- Disclosure in discovery during filed cases (invariably under the protection of a court approved confidentiality order).

- Providing relevant documents to experts so that they have the facts necessary to form expert opinions. Experts are typically required to sign confidentiality agreements and are not typically given unlimited direct access to the Multistate's cloud-based document review platform.

- Occasionally referring to a specific document with another witness. This may be done where two witnesses have conflicting memories of an event, for example, or where the Multistate is trying to learn about an industry and has questions about terminology or industry norms.

- Sometimes individual documents or excerpts from documents are included in evaluative materials that are used within the Multistate team. For example, when considering the merits of a specific legal argument the Multistate may circulate a memorandum that includes such materials, or may use them in a video or telephone conference on the issue.

- Some individual lawyers in the Multistate may create relatively small research files in their own computer systems to facilitate their own work. For example, this may occur when an assistant attorney general is putting together a status memo for the Attorney General and "front office" staff about the status of a Multistate, and such a memo may include key evidence.

The nuances of document sharing between a Multistate and private class counsel in a parallel case are beyond the scope of this article and can be highly case-dependent, but a few points are in order. Once a Multistate files a lawsuit, this relationship is frequently defined by parallel

21 This is a typical approach, but there is variation in how Multistates handle documents, particularly in preliminary stages or small-scale investigations that may not warrant the expense of a centralized document review platform.

or joint orders entered in both cases. These orders frequently require document sharing at some level. For example, a defendant may be required to provide all discovery in to both private plaintiffs and the Multistate. Conversely, there may be a single limit requiring joint plaintiffs' depositions across both the private class action and the Multistate enforcement case, which necessitates coordination and sharing of documents relevant to those depositions. Private plaintiffs' counsel and the Multistate may need to share documents when working together on motions or case strategy, or if jointly hiring experts. However, these types of document sharing are typically limited to the specific relevant documents at issue, rather than giving private plaintiffs' counsel access to the Multistate's document review platform database.

A common mistake in these sorts of negotiations about the use of evidence is for the witnesses' counsel to focus too narrowly on what appears to be favorable language in the issuing state's CID statute, and to make demands based upon their interpretation of that language without considering the consequences. For example, even if the statute explicitly requires the witnesses' consent to share information with other witnesses, it can be unwise to try to block such sharing completely. After all, the Multistate can usually arrange for a different state with a more favorable statute to issue an identical CID, or find a witness who has much the same information and is willing to consent to its unrestricted use.

A common problem that arises in negotiations about confidentiality is that counsel for the witness treats the state enforcers as if we were representing a private litigant who may be in competition with the witness. Counsel frequently try to include boilerplate provisions or concepts that are typical of confidentiality orders in private litigation, without considering whether those provisions are appropriate in the context of state enforcement actions. Here are some examples:

- The witness's counsel seeks to include "attorneys eyes only" or "highly confidential" designations which are sometimes used in private litigation to prevent trade secrets from passing to a competitor, but which are rarely justified when dealing with state enforcers. In private litigation, these types of "beyond confidential" designations are generally intended to keep trade secrets from going to the party on the other side of the case, which may be a direct competitor of the producing party. [22] However, that is not an issue in a Multistate investigation because we don't represent a competing business. Conversely, those designations are typically not adequate to provide any particular protection for trade secrets under the designation requirements of state FOIA statues, and counsel who rely upon them may be inadvertently waiving the right to claim trade secret status under a state's FOIA law.[23]

- The witness's counsel insists upon the ubiquitous "return or destroy upon the completion of litigation" clause. Those clauses frequently conflict with state records retention laws, and also may not be practical in certain states for a variety of reasons. These variables are not always under the control of the attorney general's office.[24] Thus, states will typically seek limiting clauses, stating that materials provided by the witness will be deleted when permitted under state retention laws and government policy, to the extent that it is feasible to do so.

- The witness's counsel tries to keep too much confidential, for example by insisting that all documents be filed under seal, or by designating virtually everything as "confidential."[25] In private litigation it often benefits both sides to restrict disclosure of not only highly confidential material such as trade secrets, but also materials that may be simply embarrassing or awkward. Thus, both sides may support broad orders limiting public disclosure in court filings. State enforcers, however, represent the public interest, including the public's right to know what a case is about and the nature of the evidence in the case. We are usually happy to keep a company's internal financial projections out of the public record, but don't ask us to redact emails about a personal relationship between executives of competing companies that may be relevant to a price fixing scheme.

22 These designations may make sense in limited situations where information is being shared between state enforcers and counsel for a private class action. Thus, they are sometimes seen in confidentiality orders filed in Multistate cases where discovery is being conducted jointly with an MDL.

23 For example, to claim the specific trade secret protection under Utah's version of FOIA, the party submitting the document to the government must provide "with the record" (arguably contemporaneously with production) "a concise statement of reasons supporting the claim of business confidentiality" for each "record that the person believes should be protected." Utah Code §63G-2-309(1)(a)(i). Given the burdens that process may entail, most counsel for witnesses in antitrust cases rely upon the specific confidentiality provisions of the Utah Antitrust Act, Utah Code §76-10-3107(9), rather than claiming trade secret protection *per se*. See also, Utah Code §63G-2-201(3)(b)(a record is not public under Utah's FOIA statue if access is restricted pursuant to another statute).

24 For example, an independent branch of state government may control the process of computer file backups for IT and other purposes. Likewise, an archives or government records office may control the retention and ultimate disposition of records.

25 Overuse of "confidential" designations by a witness when producing documents also creates FOIA problems. When a requestor challenges denial of a FOIA request in court, if the court conducts an in-camera review and determines that such a designation has been significantly overused there is a palpable risk that the court will summarily deny protection to any documents provided by the witness.

- The witness's counsel insists on language changes because "we are more comfortable with our language." Even where that proposed language is arguably clearer or otherwise superior, counsel for the Multistate need to consider the impact of non-uniformity in the context of a case involving numerous witnesses and state enforcers in dozens of states. Variation is acceptable in some parts of a WCA or CID, and the request for a change by witness's counsel can be accommodated. For other topics, such as notice of a FOIA request that may implicate the witness's documents, variation would lead to serious problems because of the need for a uniform process across the case. For example, if the WCA has a ten-day notice provision, we won't agree to a five-day notice provision for one witness.

Ultimately, the key to understanding the confidentiality of witness information is good communication between counsel for the witness and the assistant attorneys general who are representing the Multistate. Which is why this is typically the first conversation that we have after we issue a CID.

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