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Seeking Discovery from State Agencies in State Attorney General Litigation

Gibson Dunn has extensive experience advising multinational companies operating online services on a wide variety of regulatory and law enforcement investigation, enforcement, strategic counseling, litigation, and appellate matters relating to youth online safety, including on privacy and AI-related issues.

During the investigation phase, State Attorneys General (State AGs) have broad authority to seek documents and information from both targets and witnesses, typically through the use of Civil Investigative Demands (CIDs). During this phase, a defendant is often hamstrung in the information it can obtain from the State, usually limited to what it can obtain through public records act requests. Once the matter proceeds to litigation, however, a defendant has for the first time the opportunity to formally seek information in discovery from the State. This opportunity for offensive discovery can be useful to level the playing field for defendants who may have been the subject of extensive information requests prior to the onset of litigation. And particularly useful may be discovery from state agencies involved in the matter *other* than the State AG. For instance, in a procurement fraud case, discovery from the agency involved in the purchasing decision may be useful.

Recently, there has been significant litigation surrounding the extent to which records from other state agencies are directly discoverable as party discovery from the State AG in matters brought by the AG–i.e., are within the possession and control of the State AG's office. Courts have issued conflicting decisions. Some courts have found that when a State AG files a lawsuit it is responsible for producing discovery on behalf of the state's agencies because the AG purports to

act on behalf of the entire state.

Other courts have found, however, that defendants must serve third-party subpoenas to obtain documents from state agencies because the State AG does not have possession or control over the documents held outside of its office. Further, State AGs generally oppose requests for production of documents from other state agencies on the grounds of burden. In such cases, this process may be less effective in states that have legal frameworks to shield agencies from discovery demands, producing a protective effect similar to federal *Touhy* regulations, which restrict to some degree state employees' ability to comply with subpoenas relating to the state agency's work.[1]

Practitioners should be aware of how the relevant jurisdiction handles this issue prior to seeking state agency discovery.

I. Courts Holding The State AG Must Produce Documents From Other State Agencies

Recently the Eastern District of Washington addressed this issue in *United States v. MultiCare Health Systems*. On August 12, the district court ordered the Washington State AG to produce records from state agencies. *See* Order, Dkt. No. 102, *U.S. v. MultiCare Health Sys. et al.*, 2:22-cv-00068-SAB (E.D. Wash. Aug. 12, 2025). In this matter, the State of Washington alleged that the defendant hospital system knowingly overbilled Medicaid for the costs of fake and medically unnecessary procedures as part of an alleged fraud scheme by a neurosurgeon. During discovery, the defendant served requests for production on the AG seeking documents from the Washington State Health Care Authority (HCA) related to its Medicaid reimbursement policies, and from the Washington State Department of Health (DOH) related to its investigation of the neurosurgeon. The State opposed the motion, arguing that because the agencies were not named in the complaint, the defendant must follow the procedure for serving nonparty subpoena requests under Federal Rule of Civil Procedure 45. The court disagreed, holding that, because the state "has the legal right to obtain documents upon demand from state agencies," "discovery addressed to the State of Washington *includes its agencies*." *Id.* at *3 (emphasis added) (citing *Washington v. GEO Group, Inc.*, 2018 WL 9457998, *3 (W.D. Wash. 2018)). The court thus ordered the State's compliance with the discovery requests as to both the documents related to the investigation by the DOH and the general Medicaid reimbursement policies from the HCA.

In June 2023, the Northern District of Illinois reached a similar conclusion in *Illinois ex rel. Raoul v. Monsanto Co.* In that case, the Illinois Attorney General brought an environmental action against Monsanto Company and its subsidiaries, alleging that Monsanto's polychlorinated biphenyls (PCBs) and other hazardous materials contaminated the Illinois environment. *See Illinois ex rel. Raoul v. Monsanto Co. et al.*, 2023 WL 4083934, at *1 (N.D. Ill. June 20, 2023). During discovery, Monsanto sought responsive documents in the possession of state agencies that were referenced in the State's complaint. *Id.* Monsanto argued that the Illinois AG had the legal authority to obtain documents held by state agencies, and therefore, the State was "obligated to produce responsive documents in the possession, custody, or control of state agencies." *Id.* The State objected on separation-of-powers grounds and asserted that the AG could not produce such documents because the AG "does not have an unfettered legal right to obtain documents from non-party state agencies." *Id.* The court rejected the State's constitutional arguments. *Id.* It instead found that "principles of fundamental fairness" permitted defendants' discovery of responsive documents in the possession of those agencies referenced

in the State's complaint. *Id.* at *4. The court reasoned that those agencies "undoubtedly hold many relevant documents" and would benefit from the AG's success. *Id.* Further, the court held that the Illinois AG had control over responsive documents possessed by state agencies referenced in the complaint. *Id.* at *6. It explained that this control was based on the AG's "broad statutory and common law powers to control and manage legal affairs on behalf of state agencies." *Id.* at *5. Finally, the court opined that third-party discovery tools were "not very efficient" and less likely than direct party discovery to achieve results consistent with Federal Rules of Civil Procedure 1 and 26. *Id.* at *7. Nevertheless, the court found that Monsanto must use third-party discovery tools to the extent it sought documents from state agencies not named in the complaint. *Id.*

II. Courts Holding The Defendant Must Use A Third-Party Subpoena To Seek Documents From Other State Agencies

A recent decision from the Ninth Circuit reached a different result. On August 22, 2025, the Ninth Circuit vacated an order requiring State AGs and third-party state agencies to respond to discovery requests seeking, among other things, communications between the states and other government entities, including federal, state, and local agencies. *See In re People of the State of California*, No. 25-584, 2025 WL 2427608 (9th Cir. Aug. 22, 2025). In an unpublished opinion, a three-judge panel exercised the court's infrequently invoked mandamus authority to block a discovery order requiring third-party agencies to produce responsive documents. The Court held that under the California state appellate court decision in *People ex rel. Lockyer v. Superior Court*, 122 Cal. App. 4th 1060 (2004), even in cases where the state is a litigant, the California AG is not deemed to have possession, custody, or control over all documents of any state agency.

The *Lockyer* decision highlights a distinction between requests for documents related to the investigation versus those that may be relevant, but not directly related to, that investigation. In *Lockyer*, the court found that "to the extent that any state agencies had a role" in the investigation, "documents related to that investigation may be sought directly from the People." 122 Cal. App. 4th at 1078 (emphasis removed). In contrast, when a state agency generates documents as part of its "ordinary course" duties, it operates as a third-party to the lawsuit and a "distinct and separate governmental entit[y]" that "can be compelled to produce documents only upon a subpoena." *Id.* The court's analysis, echoed by the State AGs in their arguments to the Ninth Circuit panel in *In re People of the State of California*, points to the California Constitution and statutes in support of the assertion that "[e]ach agency or department of the state is established as a separate entity." *Id.* In *Lockyer*, the court also stated it "would be unduly burdensome if any time the People are a party to litigation they are required to search for documents from any and all state agencies that the propounding party demands." *Id.* at 1080.

Although the Ninth Circuit in *In re People of the State of California* relied on *Lockyer* to grant mandamus, it did not grant mandamus as to requests to Pennsylvania state agencies, because Pennsylvania law "explicitly grants [the Attorney General's] office control over the documents of nonparty state agencies." *In re People of the State of California*, 2025 WL 2427608, at *3 (citing 71 Pa. Stat. and Cons. Stat. § 732-208 (West 2025)).

The Eastern District of New York reached a similar result in *United States v. Am. Express Co.*, No. 10-CV-04496 (NGG) (RER), 2011 WL 13073683, at *2 (E.D.N.Y. July 29, 2011). In that case, the court found that "state agencies—even those that are part of the executive branch—are neither subject to common executive control nor interrelated with the State Attorneys General, and so should not be aggregated together for discovery purposes." 2011 WL 13073683, at *2. The court based its finding on the independent and separately elected nature of the State Attorneys General Office pursuant to state constitutions and statutes. The court nonetheless acknowledged that "party discovery would be unquestionably more efficient" and less burdensome for the party seeking state agency discovery than using a Rule 45 subpoena. *Id.* at *4. The court also urged the State AG's office to "take an active role in encouraging" the agencies' cooperation with responding to the document requests. *Id.*

As the court in *Am. Express Co.* noted, defendants in AG litigation seeking discovery from state agencies often prefer to do so through party discovery served on the AG, as opposed to being required to follow subpoena processes. Party discovery is simpler, more efficient, and has fewer procedural hurdles. AG offices, however, will often challenge such discovery, claiming that the materials of other agencies are not within the AG's "control" and that it is unduly burdensome for the AG to collect materials from other agencies. In seeking agency discovery, it is incumbent on counsel to understand the dynamic and relationship between the various state agencies at issue, as well as the principles of law governing the jurisdiction at hand. And while the decisions above may impact *how* a defendant seeks documents, they do not foreclose the option of seeking such documents as part of a party's litigation strategy.

[1] *See e.g.* Cal. Evid. Code § 1040 (West) (public entities' privilege to "refuse to disclose official information" and "prevent another from disclosing official information"); Tex. R. Civ. P. 176.6 (statutory limitation on the designation of an appropriate employee to testify on agency matters).

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Gibson Dunn's State AG Task Force assists clients in responding to subpoenas and civil investigative demands, interfacing with state or local grand juries, representing clients in civil and criminal proceedings, and taking cases to trial.

Gibson Dunn lawyers are closely monitoring developments and are available to discuss these issues as applied to your particular business. If you have questions, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following members of Gibson Dunn's State Attorneys General (AG) Task Force, who are here to assist with any AG matters:

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