Internal Investigations: Ethical and Practical Challenges
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Internal Investigations:
Overview

- **Classic Situation:**
  - Attorney is asked to provide legal advice where majority shareholder and the family-owned corporation are subject to a regulatory investigation with criminal implications.
- **Ethical and Practical Challenges:**
  - Attorney attempting to represent both the corporate entity and the majority owner (or other shareholder or employee) may face conflict of interest.
    - Corporation and majority owner's criminal exposure potentially create adverse interests.
    - Even though corporation may have options that would decrease its potential criminal exposure, it could be at the cost of sacrificing the majority owner's interest. Alternatively, the majority owner's actions may increase the corporation's liability.
  - Corporation's liability will turn, in part, on the guilt or innocence of the individual. At the same time, the individual has greater constitutional rights and potentially more factually defenses than those of the corporation.
  - Where the corporate entity and its top manager are virtually identical, joint representation may be advantageous to both.
    - Representation of corporation provides counsel with greater access to information from employees acting within scope of employment.
    - Attorney who is jointly representing individual and corporation can more readily ensure individual's constitutional rights are not inadvertently waived.
- **Key Elements in Analyzing the Attorney's Role and Fiduciary Duty:**
  - Whom does the attorney represent?
    - Identifying the client is essential to proper determination of matters such as to whom the lawyer owes a duty of confidentiality and whether current or former client conflict exists.
  - May attorney jointly represent corporation and the majority owner?
    - Is it advantageous to both corporation and majority owner to have joint representation?
  - What about the interests of minority owners?
  - Is it sufficient to advise of potential conflicts and obtain written waivers?
    - Is it sufficient to advise to consult with separate counsel before signing the waiver?
  - Who is authorized to speak for the company and provide instructions to the attorney?

Internal Investigations:
Who Is the Client?

Representation of Corporations – General Legal Principles:

- The corporation is the client – but what does this mean in terms of the attorney-client relationship?
- What is a corporation?
  - A corporation can only act through its officers, directors, and employees.
  - The acts of these individuals, within the scope of employment, constitute the acts of the corporation.
- **Oregon law** – When a corporate entity is represented by counsel, in addition to the corporate entity, the "represented parties" may include principals, officers, directors and employees – even line workers and those whose jobs do not typically involve communication with the lawyers.
    - Oregon Rules of Professional Conduct (RPC) Rule 4.2 -- represented parties include (1) any individual who "is a part of corporate management or a corporate officer or director," and (2) any individual whose "conduct is at issue in the litigation – e.g., because the government seeks to hold the entity vicariously liable in whole or in part for the individual's acts or omissions. Or. Eth. Op. 1991-80 (July 1991).
    - *State ex rel. OHSU v. Haas*, 325 Or. 492, 509 (1997) (interpreting OEC 503(1)(d), rejecting narrower "control group" test, and concluding that represented parties may include principals, officers, directors or employees).
    - *In re Weidner*, 310 Or. 757 (1990) (test for whether attorney-client relationship exists turns on subjective intent of potential client); *see also In re Conduct of O'Byrne*, 298 Or. 535 (1985).
- **Federal Law** – Concept of the "corporate client" is explained within the context of the attorney-client privilege and entity liability.
  - For purposes of adequately representing the corporate client, counsel must have ability to have privileged communications with all levels of employees. *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981).
  - Under the doctrine of *respondeat superior* the corporation may be held vicariously liable for the acts or omissions of its corporate employees and agents acting within the scope of employment or apparent corporate authority, even when those acts are contrary to corporate policy or directives or harm the corporation. *See New York Central Hudson River R.R. Co.*, 212 U.S. 481 (1909) and progeny discussing entity liability (below).

Internal Investigations:
Privileges and Confidences

Attorney-Client Privilege

- Corporation has an attorney-client privilege.
- Privilege supported by public policy.
    - Corporation must have ability to undertake internal investigations of wrongdoing. Privilege encourages full and frank communications between attorneys and clients. *Upjohn Company v. United States*, 449 U.S. 383 (1981); *Port of Portland v. Oregon Center for Environmental Health*, 238 Or. App. 404, 409 (2010).
- Privilege extends to discussions between "represented parties" and counsel – which include low-level employees and corporate counsel. *See* OEC 503(1)(d) (above).
- Communications with counsel made during the course of an internal investigation are privileged if made (1) to secure legal advice, (2) within the scope of the person's employment, and (3) at the direction of the employee's corporate superiors. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981).
- Requires a reasonable expectation of confidentiality. *See* OEC 503; *Weil v. Investment/ Indicators*, 647 F.2d 18, 24 (9th Cir. 1981); *Port of Portland*, 238 Or. App. at 410.
    - Under federal law, a different standard applies, and communications are privileged if the proponent of the privilege can meet an eight-part test, *see United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009).
- When the control of a corporation passes to new management, authority to assert and waive the corporation's attorney-client privilege passes as well.
    - A corporation's new managers may waive the privilege with respect to communications made by former officers and directors. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985); *see also Polycast Technology Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 50 (S.D.N.Y. 1989) (holding that after sale of subsidiary, both prior parent and current owner entitled to file from period of dual representation).

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Internal Investigations:
Privileges and Confidences *continued*

- A corporate officer or employee may establish a personal privilege for communications with corporate counsel by showing that he approached counsel and sought confidential advice in an individual capacity. *United States v. Graf*, 610 F.3d 1148, 1161 (9th Cir. 2010).

- Under the crime-fraud exception, the government may be able to extinguish privilege attached to attorney-client communications where there is a showing that communications were in furtherance of an intended or present illegality and that the communication and illegality are linked. *In re Grand Jury Proceedings*, 87 F.3d 377 (9th Cir. 1996).
    - Section 307 of the Sarbanes-Oxley SEC Act of 2002 also prescribes minimum standards of professional conduct and practice before the SEC in representing issuers. Lawyers may no longer ignore credible evidence of corporate misconduct.

Work Product

- Protection for records prepared in anticipation of litigation by either represented party or party's attorneys.
- Stronger protection when records reveal attorney's mental processes. *Hickman v. Taylor*, 379 U.S. 495 (1947); ORCP 36B(3), FRCP 26(b)(3) and Rule 16(b)(2) of Federal Rules of Criminal Procedure.
- Case specific – does not apply in other litigation.

Internal Investigations:
Entity Liability

Under the Doctrine of *Respondeat Superior*, Corporations May Be Criminally Liable for the Actions of Their Employees

- Corporations are criminally liable for wrongdoing by employees or agents acting within scope of employment or apparent authority if agents intend, at least in part, to benefit the corporation. *New York Central Hudson River R.R. Co.*, 212 U.S. 481 (1909).
- Corporation may be liable for actions of employees at lowest rungs of hierarchy. *See e.g., United States v. Dye Construction Co.*, 510 F.2d 78,82 (10th Cir. 1975) (corporation liable for willful violation of OSHA regulations for failing to shore up trench where back hoe operator had observed the trench prior to its cave-in).
- At least under federal law, corporation can be criminally liable for the acts of employees even if those acts actually harm the corporation, are only of slight benefit to the corporation, or were against express corporate policies.
    - *U.S. v. Sun-Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1998), *affirmed* 526 U.S. 398 (1999). Court found that agent/employee did not need to be acting solely or even predominantly with intent to benefit corporate principal; that there was liability as long as act was within the scope of employment and there was motivation to benefit company "to any appreciable extent."
- Additionally, because federal law looks to whether the employee acted with "apparent" authority, corporation may be liable for acts of employees even when the employee acted against express corporate policies or direction of superiors.
    - *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972). Court found that corporation was liable even without proof that conduct was within agent's actual authority, and even though it may have been contrary to express instructions.
- Finally, the corporation may be liable for the aggregate actions and collective knowledge of various employees, even when no single individual could be liable (*e.g.*, because the individual who acted did not have the requisite culpable mental state).
    - *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987). Court found that under "collective knowledge doctrine," culpable mental state may be imputed to corporation from one or more individuals, even where no single individual had enough knowledge to satisfy the *mens rea* requirement.
- Oregon:
    - *Cf. Paur v. Rose City Dodge, Inc.*, 249 Or. 385, 390 (1968) (corporation can be liable vicariously for malicious act—ordering assault of customer—of managers who were entrusted with executive management).
    - *Cf. Wright v. ICOA Life Ins. Co.*, 250 Or. 349 (1968) (in libel action, corporation, which published defamatory item, can be held vicariously liable for malicious acts of its officers).

Internal Investigations:
DOJ Policies

DOJ Policies of Cooperation and Compliance

- The factors affecting prosecutors charging decisions, as well as sentencing factors, favor corporations that cooperate in criminal investigations by providing evidence against culpable officers, managers and employees.
- The factors affecting federal prosecutors' charging decisions are set forth in the U.S. Attorneys Manual (USAM) Chapter 9-28.000 *et seq.* (Principles of Federal Prosecution of Business Organizations).
- The Factors include:
    - Nature and seriousness of offense;
    - Pervasiveness of wrongdoing;
    - History of similar misconduct;
    - Timely and voluntary disclosure;
    - Willingness to cooperate;
    - Pre-existing compliance programs;
    - Remedial actions; and
    - Collateral consequences.
- Principles articulated under USAM §9-28.000 supersede earlier DOJ memoranda setting forth charging guidelines, including:
    - Holder Memo (1999)
        - Corporation's compliance programs and its cooperation in any government investigation are factors to be considered when deciding whether or not to indict.
    - Thompson Memo (Jan. 20, 2003)
        - Sets forth 9 factors and provides that in assessing corporation's cooperation in any investigation into wrongdoing, prosecution may consider "corporation's willingness to identify culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive the attorney-client and work product protection."
    - McNulty Memo (Dec. 2006)
        - Explicitly provides that waivers of attorney-client privilege and work product protections are <u>not</u> prerequisite to a finding that corporation has cooperated in government's investigation.

Internal Investigations:
Practical & Ethical Issues Resulting from DOJ's Policies

- **Corporate counsel's ethical duties are owed to the entity itself.**
- **DOJ policy may create conflict of interest between corporate entity and corporate officers and employees.**
  - Cooperation with DOJ essentially makes corporation part of prosecutorial team.
  - As precondition for declining prosecution, DOJ may require corporation to take a hard line (*e.g.*, fire those not cooperating with government's investigation).
  - An internal investigation may trigger a criminal prosecution.
    - *See, e.g.*, *United States v. Reyes*, 239 F.R.D. 591 (N.D. Cal. 2006). Allegations from former employee that company committed fraud led company's audit committee to institute an internal investigation. Subsequently, company restated its earnings, which drew the attention of regulators and law enforcement. Ultimately, company shared the results of its internal investigation with the government, which led to the criminal prosecution of company's CEO Gregory Reyes.
  - Corporate counsel may be deemed to be acting as an arm of the government, such that false statements made in the context of internal investigations may lead to prosecution for obstruction of justice.
    - *See United States v. Singleton*, No. H-06-080, 2006 WL 1984467, at *4-5 (S.D. Tex. July 14, 2006) (refusing to dismiss indictment for obstruction and reasoning that "outside attorneys were acting as an arm of the investigating agencies" that had formally requested information from the company); *United States v. Stein*, 440 F. Supp. 2d 315, 337 n.114 (S.D.N.Y. 2006) (observing that DOJ takes position that making of false statements to private attorneys representing corporations that are under investigation and cooperating with the government may constitute obstruction of justice).
  - Also consider: Internal investigation may show crimes committed in the company, but CEO or President may have clear defenses. Consequently, there may be liability on company's part, but not on executive officer's part. Disclosure of misconduct may or may not be in the officer's interest.
- **Companies may indemnify employees and government may not consider it noncooperation when company advances attorneys' fees to employees or agents under investigation.**
    - *United States v. Stein*, 435 F.Supp.2d 330, 367 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130, 155-56 (2nd Cir. 2008). Court addressed criminal defendants' claim that the government had violated their Sixth Amendment rights to counsel by pressuring their employer, the accounting firm KPMG, to stop advancing their defense costs. Court found that the defendants had a reasonable expectation that KPMG would advance fees, giving them a property interest with which the government could not interfere.

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Internal Investigations:
Practical & Ethical Issues Resulting from DOJ's Policies *continued*

- **Question as to whether company's employees engaged in criminal wrongdoing raises multiple, complex possibilities:**
    - If organization knows employee is guilty of criminal wrongdoing, corporation may seem justified in punishing him because of employee's breach of loyalty to corporation.
        - However, in small or family-owned business, the interests of company and majority owner frequently overlap.
        - Firing implicated employee/corporate head may not be an option – *e.g.*, it may not in best interest of the company.
    - In small or family-owned businesses, corporation may choose to protect valuable employee even at risk to itself.
        - Risk is that corporation's assisting implicated employee is discouraged by DOJ's charging policy, which places premium on cooperation with government and voluntary disclosure.
        - For example, the EPA, SEC and DOJ, when considering a corporation's cooperation, look favorably upon corporations that take action against non-cooperating employees and look unfavorably on corporations that appear to shield culpable employees.
- **Whistleblower issues:**
    - DOJ guidelines encourage internal investigations and whistle-blowing.
    - Whistle-blowing, in turn, may expose criminal wrongdoing within corporation.
    - Exposure raises issue for corporation of whether or not and when to report to government.
        - Although there is no duty to turn oneself in, company's not doing so could be seen as noncooperation in case of subsequent government investigation.
        - Options:
            - Corporation mitigates future harm by initiating corrective actions:
                - Going forward with effective internal review of corporate practices;
                - Creation of corporate compliance program;
                - Where interests of company are not harmed, firing those responsible for wrongdoing can create new, "clean" corporate structure;
                - In case of subsequent government investigation, measures show company's effort to reform itself and remedy once-existing questionable practices.

Internal Investigations:
Conflicts of Interest

Basic Conflict-of-Interest Rules

- Oregon RPC 1.7(a) [and Restatement §§ 121-22, 128-31]:
  - Duty of undivided loyalty to current clients – Oregon lawyers and law firms may not represent one current client adversely to another current client on any matter unless, at a minimum, both clients consent to the conflict after full disclosure.
    - Under "firm rule," prohibition applies to entire firm – RPC 1.10(a), *see also* OSB Formal Ethics Op. No. 2005-50.
    - Former-clients conflict rules more lenient than current-client conflicts rules.
  - Waiver under RPC 1.7(b):
    - Lawyer reasonably believes she will be able to provide competent and diligent representation to each affected client. RPC 1.7(b)(1).
    - Representation not prohibited by law. RPC 1.7(b)(2).
    - **Critical:** Each affected client gives informed consent, confirmed in writing. RPC 1.7(b)(4).

General Conflict Rules Applying to Organization as Client

- Oregon RPC 1.13: Lawyer hired by a corporate client represents the organization acting through its duly authorized constituents.
  - In event of falling out between corporation and one or more of its officers, directors, shareholders, or employees, lawyer is free to represent the corporation. RPC 1.13(a).
- However, representation of corporation that is wholly owned by a single family or individual may be viewed as *per se* representation of shareholders. *In re Banks*, 283 Or. 459 (1978); *see also* OSB Formal Ethics Op. No. 2005-85.
  - Per *Banks*, when conflict arises between corporation and the individual who practically solely controls the corporation and to whom the benefits of the corporation flowed, lawyer must withdraw from representation of both.
  - Different result under *In re Kinsey*, 294 Or 544, 562 n.10 (1983), where Oregon Supreme Court noted that normal entity theory applied when corporation was owned by shareholders who were not members of the same family.
  - Pursuant to OSB Formal Ethics Op. No. 2005-85, *Banks* rule may not apply if family of shareholders is extended and fractious family rather than one whose interests are aligned.

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Internal Investigations:
Conflicts of Interest *continued*

General Conflict Rules Applying to Organization as Client *continued*

- Lawyer hired to conduct an investigation must not mislead corporate officers or employees into believing she represents those officers or employees as individuals. RPC1.13(f); RPC 4.3 and 8.4(a)(3).
    - Lawyer who wishes to negate application of *Banks* should inform shareholders or owners in writing that they are not lawyer's individual clients. OSB Formal Ethics Op. No. 2005-85.
    - Attorney may consider instructing employees of the implication flowing from the interview at the beginning of any questioning.
- Lawyer who becomes aware that an officer or employee acts in violation of a legal obligation to the organization or does something illegal that might be imputed to the organization must inform "higher authority" in the organization (chief legal officer or chief executive officer) unless it is not in the best interest of organization to do so. RPC 1.13(b) and (c).
    - If a situation where the *Banks* rule applies (family-owned business), this discovery and the attorney's responsibility under RPC 1.13 may create a conflict and an ethical obligation to withdraw from representation altogether.
    - Exceptions to general rule.
        - Subordinate lawyers need only report to supervisory lawyers;
        - Lawyer has no duty to report where retained by chief legal officer to investigate evidence of material violation and reports to latter;
        - Lawyer was retained by chief legal officer to assert colorable defense in judicial or administrative proceedings and attorney provides timely reports to board, board committee, or Qualified Legal Compliance Committee;
        - Lawyer was retained by Qualified Legal Compliance Committee to investigate or assert colorable defense in judicial or administrative proceedings. *See* Oregon RPC 1.13(d).

Internal Investigations:
Joint Representation

Ethical Issues in Employee and Director Interviews

- Counsel conducting an internal investigation ordinarily should provide *Upjohn* warnings to corporate officers and employees who are interviewed during the course of the investigation to assure that the interviews are privileged and that the corporation owns the privilege. *Upjohn Co. v. United States*, 449 U.S. at 394. ABA Model Rules of Professional Conduct 1.13(f) and 4.3.
    - *Upjohn* warnings commonly involve advising the employee that the lawyer represents the company, not the individual, that the interview is privileged, and that only the corporation may waive the privileged nature of the interview. See *United States v. Ruehle*, 583 F.3d at 604 n.3.
- Outside counsel involved in representing a corporation and its officers on other matters, such as shareholder derivative suits, must clarify the context and scope of officer interviews or risk disciplinary action. See *United States v. Ruehle*, 583 F.3d at 606 (outside counsel referred to state Bar for possible disciplinary proceedings).

Joint Representation Issues:

- Lawyer representing organization may also represent any of its directors, officers, or employees. RPC 1.13(g).
    - RPC 1.13(g) is subject to the provisions of RPC 1.7(a) and (b).
    - RPC 1.7(a) provides, *inter alia*, that "a lawyer shall not represent a client if the representation involves a current conflict of interest."
    - RPC 1.7(b) provides that even if a current conflict exists, a lawyer may represent a client if the lawyer believes she will be able to provide diligent representation to each affected client and the representation does not require the attorney to perform on behalf of one client such that it impairs the competent and diligent representation of the other client. Each client must give informed and written consent.
    - Pursuant to RCP 1.13(g), "consent may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."
        - "[A]s a general rule, officers of a corporation may have apparent if not actual authority to bind the Board in approving a dual representation by an attorney of the corporation and a third party." *Kidney Ass'n of Oregon, Inc. v. Ferguson*, 100 Or. App. 523, 525, 786 P.2d 754 (1990).

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Internal Investigations:
Joint Representation *continued*

- There must be full disclosure of the facts.
  - "[I]t is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them, but he must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them." *See In re Boivin*, 271 Or. 419, 424 (1975).
  - Full disclosure may also require advice that each party should have independent counsel. *Id.*
- Joint representation may still be problematic because of potential conflict between company and corporate officer's interests
  - Under OEC 503(4), attorney-client privilege applies differently when attorney represents several clients.
    - Communications between one client and an attorney are not privileged as against other joint clients, although they are privileged against the world. The privilege may not apply if jointly represented clients have a dispute and sue each other. *See, e.g., Hunydee v. U.S.*, 355 F.2d 183 (9th Cir. 1965).

Internal Investigations:
Joint Defense Agreements

Joint Defense Agreements

- Where separate counsel of each affected client is necessary, joint defense agreements may be a tool to maximize the sharing of information between or among parties while avoiding the restrictions and risk of conflict inherent in joint representation.
- Joint defense agreements are contracts crafted by all parties.
- Joint defense agreements historically viewed as extension of attorney-client relationship protecting communications between clients and counsel to degree that they share common interests and where communications intended to facilitate effective representation. *Continental Oil Co. v. United States,* 330 F.2d 347 (9th Cir. 1964).
- Joint defense privilege is well-recognized within the Ninth Circuit and in other circuits. *See, e.g., Hunydee v. United States,* 355 F.2d 183 (9th Cir. 1965); *United States v. Henke,* 222 F.3d 633 (9th Cir. 2000)
- Joint defense agreements found exempt from disclosure under Oregon law. *See Port of Portland v. Oregon Center for Environmental Health,* 238 Or.App. 404 (2010).
    - In *Port of Portland,* the Court of Appeals found that agreement among Port and several other potentially responsible parties (PRP) for cleanup of harbor Superfund site under CERCLA was a "confidential communication" within meaning of statute that established attorney-client privilege and that agreement, therefore, was not subject to the Inspection of Public Records Act.
- But the privilege can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue. *See Henke,* 222 F.3d at 637.
- Joint defense agreements cannot be waived without the consent of all parties to the privilege. *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129,* 902 F.2d 244, 248 (4th Cir. 1990).
- However, beware of *United States v. Stepney,* 246 F.Supp.2d 1069 (N.D. Cal. 2003).
    - District court ordered parties to provide copies of joint defense agreements *in camera* and ordered that agreements had to include a limited waiver of confidentiality if any of the members later decided to testify.
    - Note that this case provided unusual facts and posture.

Internal Investigations:
Constitutional Rights of Corporations

The Constitutional Rights of Corporations Have a Different Scope Than Those Belonging to Individuals

- **Both corporations and individuals have rights under the U.S. and Oregon constitutions.**
  - However, counsel must be aware that the rights granted corporations and individuals are not co-extensive.
  - And, the protections afforded under federal and state constitutions, while similar, are not identical. *State v. Caraher*, 293 Or. 741, 756 (1982) ("citizens of Oregon are entitled to an analysis of the protections afforded by the Oregon Constitution independent of the United States Constitution").
- **Both corporations and individuals have a right to be free from unreasonable search and seizure.** Fourth Amendment of the U.S. Constitution; Article I, section 9, of the Oregon Constitution; *see also* ORS 133.545 *et seq.* (limiting state's ability to search or seize persons or places).
  - Government must not make unreasonable search or seizure of person's property **unless**:
    - Pursuant to Article I, section 9, person has abandoned privacy interest in area or object of search/seizure.
    - Pursuant to Fourth Amendment, person does not have reasonable expectation of privacy.
  - Assessment varies under state and federal constitutional guarantees.
    - Oregon:
      - *State v. Rivas*, 100 Or. App. 620, 623 (1990) ("Article I, section 9 protects businesses as well as homes").
      - *State v. Tanner*, 304 Or 312, 321 (1987) (entrustment of stolen video tape to third party established Art. I, section 9 privacy interest, which was violated when tape discovered through unlawful search of third party's residence even though defendant did not control access to residence).
    - Federal law:
      - *Minnesota v. Carter*, 525 U.S. 83 (1998) (under federal law, short time visitor to apartment had no Fourth Amendment privacy interest in apartment). In *Minnesota*, court also held that expectation of privacy in commercial property is different, and in effect, less than the expectation of privacy in one's home. *Id.* at 90-91.
      - *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (placing drugs in third party's purse did not establish Fourth Amendment privacy interest in part because defendant did not control access to purse).

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Internal Investigations:
Constitutional Rights of Corporations *continued*

- **Constitutional protections apply to routine administrative searches of regulated businesses.**
  - Administrative search without warrant only possible where government:
    - 1) Obtains consent; or
    - 2) Under "pervasively regulated industry" exception, *i.e.*,
      - Substantial government interest informs regulatory scheme underlying search;
      - Warrantless search necessary to further regulatory scheme;
      - Certainty/regularity of inspection program provides constitutionally adequate substitute for warrant. *New York v. Burger*, 482 U.S. 691, 702-03 (1987); *State v. Saunders*, 103 Or. App. 488, 493-94 (1990).
  - Administrative search power does **not** extend to questioning employees in course of search. ORS 459.385; ORS 466.195.
  - "Lower probable cause" showing applicable to administrative warrants. *Camara v. Municipal Court,* 387 U.S. 523 (1967); *State Accident Prevention Division of Worker's Compensation Board v. Foster,* 31 Or. App. 251, 258 (1977) (adopting "a sliding scale of evidence/probable cause" for analysis of legality of administrative search under Article I, section 9).
  - **But** state and federal constitutional rights may be violated when administrative search is used to gather information for criminal purposes (see Parallel Investigations below).
- **When faced with a subpoena corporate, counsel must be aware that there are additional constitutional rights granted to corporate employees under the Fifth Amendment that are not available to corporations.**
  - **Under federal law**, only natural persons have a right against compulsory self-incrimination.
    - Corporation cannot avoid answering interrogatories.
    - Corporation cannot refuse production of documents even if contents prove incriminatory to corporation or employees individually ("collective entity rule"). *Braswell v. United States*, 487 U.S. 99 (1988); *In re Grand Jury Proceedings*, 928 F.2d 408 (9th Cir. 1991).
      - **But** government may not use the act of production as evidence against the custodian of records. *Braswell*, 487 U.S. at 109-10, 118.
    - Corporation cannot assert right on behalf of its employees or former employees.
    - Corporation's employees cannot assert right on behalf of corporation. *State ex rel. Juvenile Dept. of Lincoln County v. Cook*, 138 Or. App. 401, 407.

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Internal Investigations:
Constitutional Rights of Corporations *continued*

- Under **Oregon** law, a question remains as to whether Oregon's constitutional protection against compelled self-incrimination extends to the accused corporate entity.

- **Employees have more rights than the corporation.** Corporate employees as individuals possess constitutional right against compulsory self-incrimination. Fifth Amendment of the United States Constitution and Article I, section 12 of the Oregon Constitution.
  - Right applies to any type of judicial or nonjudicial procedure with which state seeks to compel potentially harmful testimony. *Kastigar v. United States,* 406 U.S. 441, 44-45 (1972); *State v. Langan,* 301 Or. 1, 5 (1986).
  - Corporate employee must assert right when faced with subpoena requesting oral testimony or answer to interrogatories. *State v. Tenbusch,* 131 Or.App. 634, 641-42 (Or. App. 1994) (right against compelled self-incrimination is not self-executing).
  - Fifth Amendment privilege also applies to requests for production of documents. *United States v. Hubbell,* 530 U.S. 27 (2000) (finding that individual has right to invoke Fifth Amendment privilege when compelled to turn over documents that are incriminating or may become inculpatory evidence if act of production itself implies an assertion of fact).
    - Under Fifth Amendment, act of production privilege is not the same as privilege protecting contents of documents – it does not cover the contents.
  - No protection for documents created voluntarily. *State v. Jancsek,* 302 Or. 270, 284-85 (1986) (no State constitutional protection for act of production of letter voluntarily created and nonprivileged; left open question of whether protection applies to contents); *United States v. Doe,* 465 U.S. 605, 610-12 (1984) (no Fifth Amendment privilege for contents of taxpayer's documents).

- **Former employees:** Under Ninth Circuit law, former employees have constitutional right against compulsory production of corporate documents or records that may prove self-incriminating.
  - Under Fifth Amendment former employees no longer seen as acting as agents of corporation.
    - Collective entity rule no longer applied to former employees who were no longer acting on behalf of the collective entity. *In re Grand Jury Subpoena, dated April 18, 2003,* 383 F.3d 905, 910 n.1 (9th Cir. 2004)
    - Unless existence, location, authenticity of records is "foregone conclusion," former employee's act of production is testimonial in nature and must not be compelled. *Id.* at 910.

- Corporations and individuals share the right to be free from unlawful government intrusions on attorney-client privilege under Fifth Amendment Due Process Clause, Sixth Amendment right to effective assistance of counsel, and Oregon Constitution.
    - *See e.g., Weatherford v. Bursey,* 429 U.S. 545 (1977) (government intrusion on attorney-client relationship seriously undermines defendant's Sixth Amendment right to counsel required to ensure effective legal representation and fair trial).

Internal Investigations:
Parallel Investigations

Parallel Investigations:

- Parallel proceedings are independent, simultaneous investigations, enforcement actions, or prosecutions involving allegations and parties that are substantially the same -- *e.g.*, DEQ and a county prosecutor's office simultaneous investigations of a corporation's alleged violation of civil and criminal environmental laws.
- A parallel investigation is legitimate if it is conducted in good faith. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) (*en banc*); *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974).
- Information obtained as result of legitimate civil discovery may be—and often is—shared with criminal enforcement agents.
- **However,** under the Oregon Constitution, government may not employ a lesser standard applicable to administrative search for the purpose of gathering evidence of a crime (Article I, section 9).
    - Oregon Constitution requires showing of individualized suspicion of wrongdoing (*viz*, probable cause) to support administrative search to gather evidence for a criminal prosecution. *State v. Boyanovsky*, 304 Or. 131, 133-34 (1987).
    - *State v. Saunders*, 103 Or. App. 488, 493-94 (1990) (Article I, section 9 requires warrant to be based on probable cause when purpose of statute is to search for evidence of criminal violation of commercial fishing laws).
- Under the federal constitution, the government may conduct parallel civil and criminal investigations without violating the due process clause, so long as government does not act in bad faith. *See United States v. Kordel*, 397 U.S. 1, 11 (1970).
    - *Kordel* suggested that the government would act in bad faith if it brings a civil action **solely** for the purpose of obtaining evidence in a criminal prosecution and **does not advise** the defendant of the planned use of evidence in a criminal proceeding. *Id.* at 12-13.
    - *See also United States v. Peters*, 153 F.3d 445, 451 (7th Cir.1998) ("A consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation").
    - *See also U.S. v. Stringer*, 535 F.3d 929 (9th Cir. 2008) (finding no affirmative misconduct or deception by government and no violation of defendant's Fifth Amendment rights where defendant was advised that information is usually shared with criminal authorities).
- Fourth Amendment's bar to unreasonable searches and seizures applies in the context of dual investigations by the civil and criminal branches of the IRS, where review of documentary evidence is inherent in the investigation. *See United States v. Robson*, 477 F.2d 13 (9th Cir.1973).
    - In *Robson* the Ninth Circuit held that a government official must not "affirmatively mislead" the subject of parallel civil and criminal investigations "into believing that the investigation is exclusively civil in nature and will not lead to criminal charges". *Id.* at 18.

Internal Investigations:
Indemnification

Oregon statutory law provides for indemnification of corporate employees:

- Pursuant to ORS 62.464(1), a company may indemnify an officer, employee, or agent against liability resulting from his employment if:
  - The conduct of the individual was in good faith;
  - The individual reasonably believed that the individual's conduct was in the best interests of the cooperative, or at least not opposed to its best interests; and
  - In the case of any criminal proceeding, the individual had no reasonable cause to believe the individual's conduct was unlawful.
- Company may advance legal expenses to director who is a party to a proceeding in advance of the final disposition of that proceeding. ORS 62.468(1).
- Director must furnish written undertaking that he will repay advance in event of a final disposition that director did not meet that standard. ORS 62.468(1)(b).
- Pursuant to ORS 62.464(3), the termination of a proceeding by judgment, order, settlement or conviction or upon a plea of *nolo contendere* or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.
- Company may authorize payments under the statute by providing for advance expenses in its articles of incorporation, bylaws, by resolution of its board of directors or by contract. ORS 62.468(3).
- ORS 62.466 provides for mandatory indemnification of a company director who “was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the cooperative against reasonable expenses incurred by the director in connection with the proceeding.”
- Pursuant to ORS 62.476 officers of a company may apply for court-ordered indemnification in the same way as the director of a company.

Internal Investigations:
Practice Tips

- **Potential Conflicts:**
  - Within context of dual representation, be aware that rights of individuals and corporations are not the same; corporate client's rights and duties may conflict with rights of employees or former employees; must be careful not to waive inadvertently rights of individuals without full advice and consent.
  - To avoid conflicts between corporation and employees, corporate clients may want to designate document custodians.
  - Alternatively, obtain separate counsel for affected employees, while counseling corporation on its rights and duties regarding production of corporate records.
- **Protect yourself:**
  - It is prudent for corporate counsel to advise individual employees to obtain separate counsel, or alternatively, provide separate counsel for employees at an early stage in the investigation.
  - Harsh consequences resulting from violation of lawyer's fiduciary duty to client due to failure to obtain waiver from client – difficult to defend and significant damages.
  - Before beginning investigation and throughout, consider existence of actual conflicts of interest and potential future conflicts of interest.
  - Obtain written waivers from every affected client.
  - Consider possibility of future invocation of attorney-witness rule and disclosure requirements.
- **Witnesses:**
  - Make sure witnesses know counsel does not represent them.
  - Interview witnesses individually to avoid appearance of interviewees having to tow company line.
  - Include third party who can testify to what happened during witness interview and safeguard against future claims by witness that corporate counsel had suggested she represented the individual.
- **Searches, Seizures and Responses to Requests for Documents, Information and Interviews:**
  - Company should be advised not to give consent to administrative search lightly -- doing so waives rights under Article I, section 9, and Fourth and Fifth Amendments.
  - When government forced to obtain warrant, company may subject agency's actions to rigor of constitutional standards — critical where company potentially faces criminal as well as civil enforcement.
  - Investigate the possibility of existence of parallel proceeding that might expose corporation and its employees to criminal liability.