Know It Before You Waive It:

A Primer on the Constitutional Rights of Corporations

By Janet Lee Hoffman & Sarah Adams of Hoffman Angeli LLPB

Your client Clean Co. is defending a civil suit brought by the Environmental Protection Agency (EPA) for fees and penalties for noncompliance with certain hazardous waste disposal regulations applicable to dry cleaners. A consultant hired by the company to assist with compliance prepared a report advising Clean Co. that certain of its practices did not comply with the regulations. In a written opinion, you advise Clean Co. that the noncompliance may expose it to criminal penalties under various state and federal statutes. Clean Co.'s CEO takes a copy of the consultant's report home to review it and then resigns. A few days later, Oregon Department of Environmental Quality (DEQ) agents show up at Clean Co.'s door, purportedly to do a routine investigation of the premises. They want an employee familiar with Clean Co.'s processes to give them a tour of the facilities. At the same time, they serve a request for "all" documents related to Clean Co.'s processing methods.

Janet Lee Hoffman

Sarah Adams

Introduction

We often think of the constitutional rights of individuals—but we rarely consider that corporations also possess constitutional rights. The steps your corporate client takes in response to an agency's (or any other state entity's) request to inspect its premises, talk to its employees or hand over its documents implicate important rights that should not unwittingly be waived. Such a waiver could affect your client's rights in not only the agency proceeding, but also in an ongoing or subsequent criminal investigation.

The first step in avoiding an unwitting waiver is to know your corporate clients' constitutional rights. Under the Oregon and U.S. Constitutions, corporations are protected against unreasonable searches and seizures, yet have no protection against compelled statements. They also have other constitutional rights, including federal due process rights and the right to effective assistance of counsel.

But what do these rights mean for your corporate clients when they are facing a government search, seizure of documents and interrogation of employees? Does it matter that the search and seizure is pursuant to administrative authority or under a search warrant? Does it make a difference if the person making the potentially incriminating statement is an employee or former employee or if the statement is contained in a corporate document? Does it make a difference if the document is attorney-client privileged or if the person who possesses the document could be personally incriminated by his or her admission that the document exists? And, if your corporate clients have constitutional rights to be free from unreasonable search and seizure, to due process and to effective assistance of counsel, what are the implications of asserting them?

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The Right to Be Free from Unreasonable Searches and Seizures

Unlike the Fifth Amendment privilege against compulsory self-incrimination (discussed below), the right to be free from unreasonable searches and seizures unquestionably extends to corporations like Clean Co. This right is protected by article I, section 9 of the Oregon Constitution[1] and the Fourth Amendment of the U.S. Constitution.[2] Article I, section 9 and the Fourth Amendment protect against government violations of privacy interests, including a business's or person's privacy interest in business property.[3] These rights mean that the government cannot make unreasonable searches or seizures of a person's property, including a business's property, unless the person has abandoned his or her privacy interest in the area or object of the search or seizure (article I, section 9) or does not have a reasonable expectation of privacy in the area or object of the search or seizure (Fourth Amendment). Unless an exception to the warrant requirement applies (as will be discussed below), a search or seizure of an area or object in which a person has a privacy interest is presumed unreasonable.[4] Thus, absent an exception to the warrant requirement, a government agent cannot enter (search) or "secure" (seize) a business premises from which the public is generally excluded without consent.[5] Such an intrusion would violate the article I, section 9 and Fourth Amendment rights of any person with a privacy interest in the premises.[6]

Even for a Routine Administrative Inspection, if the Government Does Not Obtain Consent and the Search Does Not Fall Under the "Pervasively Regulated Industry" Exception, the Government Must Obtain a Valid Warrant.

Article I, section 9 and the Fourth Amendment prohibitions against unreasonable searches apply to administrative searches of regulated businesses.[7] Administrative searches are searches conducted pursuant to a regulatory or statutory scheme. The government can conduct an administrative search without a warrant if it obtains valid consent or the "pervasively regulated industry" exception applies. Otherwise, article I, section 9 and the Fourth Amendment require a valid warrant. However, the government's administrative search power (with or without a warrant) does not authorize it, absent consent, to question employees in the course of the search.[8]

Under both article I, section 9 and Fourth Amendment jurisprudence, legislative schemes that authorize warrantless administrative searches of businesses that are pervasively regulated may be reasonable.[9] A warrantless search is reasonable when: (1) a substantial government interest informs the regulatory scheme pursuant to which the search is made; (2) the warrantless search is necessary to further the regulatory scheme; and (3) the certainty and regularity of the statute's or regulation's inspection program provides a constitutionally adequate substitute for a warrant.[10] Accordingly, if the regulatory scheme under which DEQ is authorized to conduct a search of Clean Co.'s premises meets these standards, DEQ may proceed with an administrative search without a warrant or consent—assuming the search constitutes an administrative search.[11] But, regardless of how detailed, complex and important the regulatory scheme is, if it does not provide for nondiscretionary routine inspections that are limited in scope you should argue that it is not a constitutionally adequate substitute for a warrant.[12] And, even if the inspection goes forward, its scope may not exceed the bounds of the regulatory scheme under which it is conducted.

To obtain an administrative search warrant, the agency need not satisfy the probable cause standard applicable to non-administrative warrants (*i.e.,* specific knowledge that Clean Co. has committed an offense or that Clean Co.'s property contains evidence of an offense). Instead, the agency can obtain an administrative search warrant when the particular needs of the search outweigh the invasion.[13] In practice, this has meant that an administrative search warrant may issue when the search is pursuant to "reasonable legislative or administrative standards"[14] (*e.g.,* the DEQ inspection is pursuant to a regulatory and statutory scheme that provides for such inspections). The legislative or administrative standards must be specified in the warrant. And, because the scope of the search is limited to the specific administrative or statutory scheme under which the government is operating, a nexus must exist between the place or places to be searched and the administrative or statutory authority. This means that, if DEQ's statutory and regulatory scheme provide for routine inspections of paperwork related to the use and disposal of dry cleaning chemicals *in Oregon*, it would be a violation of Clean's Co.'s article I, section 9 and Fourth Amendment Rights for DEQ to use an administrative search warrant to inspect Clean Co.'s records related to out-of-state use and disposal of dry cleaning chemicals.

But Beware Parallel Criminal Investigations—the Government May Not Avail Itself of the Lesser Administrative Standard when a Purpose or Consequence of the Search is the Gathering of Evidence of a Crime (Article I, Section 9) or when the Administrative Investigation Is Used Improperly to Gather Evidence for a Criminal Investigation (Fourth Amendment).

Clean Co. may be inclined to consent to DEQ's search—the agents may have told Clean Co. that they can easily

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obtain an administrative warrant, they don't need one because dry cleaners are pervasively regulated, consenting to the search will benefit Clean Co. in any enforcement actions, and failure to consent will result in civil sanctions.[15] However, before granting consent, and thereby waiving its article I, section 9 and Fourth Amendment rights, Clean Co. should carefully consider the ramifications of the waiver. If Clean Co. asserts its rights, the government will be forced to get a warrant. Clean Co. can then subject the agency's actions—including the warrant, its supporting affidavit, and the execution of the warrant—to the rigor of the constitutional standards. Holding the agency to these standards may be especially important when the company is potentially facing criminal as well as civil enforcement.

Moreover, the Oregon constitution requires a showing of individualized suspicion of wrongdoing (*i.e.,* traditional probable cause) to support a search to gather evidence for a criminal prosecution, even when the search is conducted pursuant to a statutory or regulatory scheme.[16] A series of Oregon cases addressing sobriety checkpoints provide that a search is not "administrative" in nature if the purpose of the search is to gather evidence of a crime or the consequences of the search are criminal sanctions.[17] This suggests that when a parallel criminal investigation is ongoing, or the civil or regulatory investigators are sharing or will share information with criminal law enforcement, an otherwise administrative search may be invalid under article I, section 9 absent a warrant based on traditional probable cause.[18] The government may or may not be able to meet this higher burden.

Unlike article I, section 9, the Fourth Amendment allows use of the lower administrative standards even when the evidence may be used for a criminal prosecution unless the administrative investigation is a pretext for a criminal investigation, the civil investigation is actually being controlled by the criminal investigation, or the government is improperly using the administrative investigation to gather evidence for a criminal investigation.[19]

Here—assuming a purpose or consequence of the search is furtherance of a criminal investigation—a warrantless search or search based on the lower administrative standard would violate Clean's Co.'s article I, section 9 rights. Accordingly, as long as Clean Co. does not waive those rights, the search would be unlawful and its fruits subject to supersession, without regard to the Fourth Amendment analysis.

The Right Against Compulsory Self-Incrimination

Article I, section 12 of the Oregon constitution and the Fifth Amendment to the U.S. Constitution[20] establish a constitutional right for individuals—and not corporations—to be free from compulsory self-incrimination. [21] This right applies to any type of judicial or nonjudicial procedure in the course of which the state seeks to compel testimony that may be used, or may lead to evidence that may be used, against the witness in a criminal prosecution.[22]

Because the state and federal constitutional right to be free from compulsory self-incrimination is available only to natural persons, Clean Co. cannot invoke it to avoid answering interrogatories even when the answers will incriminate the corporation.[23] Likewise, Clean Co. has no constitutional right to refuse to produce documents even when the contents of the documents or the act of producing them is incriminatory.[24] And, because the right is personal in nature, Clean Co. cannot assert it on behalf of its employees or former employees and Clean Co.'s employees cannot assert it on behalf of Clean Co.[25] In other words, neither a corporation nor its employees may use article I, section 9 or the Fifth Amendment to avoid incriminating *the corporation*. Accordingly, Clean Co. has no article I, section 9 or Fifth Amendment privilege against producing the consultant's report in response to a valid request for production or inspection.

As Distinct from the Corporation, Custodians of Corporate Records Have—at a Minimum—Immunity from Evidentiary Use Against Them Personally of their Individual Acts of Producing Corporate Records.

Oregon courts have not addressed the extent to which article I, section 12 protects custodians of corporate records[26] from individual incrimination through compelled production of those records. Under the Fifth Amendment "collective entity rule," the government can compel corporate employees in their capacity as agents of a corporation to produce corporate records even when the contents of the records or the act of production will incriminate the employees individually, but the government may not make evidentiary use of the individual act of production against the custodian.[27] Likewise, a custodian's sworn statement that he or she does not possess the records may also be compelled, but the statement, like the act of production, cannot be used against the custodian individually.[28] Additionally, following the agency rationale underlying the act of production cases, a custodian may be compelled to identify and authenticate by oral testimony the records that she or he has produced, but such testimony cannot be used against the custodian individually.[29] Accordingly, the Fifth Amendment protects current employees from evidentiary use against them personally of their acts of production of corporate records.[30]

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The Oregon courts, when confronted with a corporate custodian's article I, section 12 challenge, may develop an independent analysis.[31] At least one other state has interpreted its state constitutional privilege against compulsory self-incrimination as protecting the custodian's right to refuse to produce the records at all, while, at the same time, not relieving corporations of their duty to produce records (for example, through appointment of an alternative custodian).[32]

Both Article I, Section 12 and the Fifth Amendment Provide Employees with a Privilege Against Compelled Sworn Testimony (and Immunize their Individual Acts of Production) that Would Incriminate the Employee Personally.

With the exception of the federal jurisprudence regarding authentication of produced documents and nonpossession statements, article I, section 12 and the Fifth Amendment provide protection against compelled sworn testimony that would incriminate the witness personally.[33] Therefore, when faced with a subpoena to provide oral testimony or answers to interrogatories, a corporate employee must assert his or her personal Oregon and U.S. constitutional rights against compelled self-incrimination or risk waiving them.

Former Employees Have Both an Article I, Section 12 and a Fifth Amendment Privilege Against Compulsory Production of Documents that Would Be Self-Incriminating.

Under Ninth Circuit precedent, the agency rationale of the Fifth Amendment collective entity rule does not apply to former employees—i.e., because former employees are no longer acting as agents of the corporation, their actions are attributable to the former employees individually. Consequently, a former employee may have personal article I, section 12 and Fifth Amendment privileges with respect to corporate records that remain in his or her possession or control and may refuse to produce them pursuant to a subpoena to the corporation or the individual.

Although no Fifth Amendment or article I, section 12 privilege applies to the contents of records that were created voluntarily,[34] the privilege does apply to the act of production itself because that act may communicate the individual's belief that the requested records exist, the individual possesses them, and they are authentic. Ninth Circuit cases hold that, unless the existence, location and authenticity of the records is a "foregone conclusion," the former employee's act of producing the records is attributable to the former employee only, is testimonial in nature and cannot be compelled.[35] Accordingly, Clean Co.'s ex-CEO, in response to a valid subpoena issued to the corporation or the individual, could claim a Fifth Amendment and article I, section 12 privilege against compulsory production of the records in her possession (unless the government can show their existence, location and authenticity is a foregone conclusion).

The Right to Be Free from Unlawful Government Intrusions on the Attorney-Client Relationship

Both the Fifth Amendment Due Process Clause and the Sixth Amendment right to effective assistance of counsel protect the right to be free from unlawful government intrusions on the attorney-client relationship.[36] These federal constitutional rights extend to corporations.[37] Accordingly, a request for documents that includes "all" documents, with no exception for attorney-client privileged communications, may violate a corporation's Fifth and Sixth Amendment rights.[38] Likewise, an administrative search (even pursuant to a regulatory scheme that includes authority to seize documents) would also violate these rights if the search and seizure unlawfully intrudes on the corporation's attorney-client relationship. Therefore, in response to the request for documents and administrative search, Clean Co. must assert or risk waiver of its constitutional rights (and other privileges) by refusing to produce any attorney-client privileged document and should also take steps to protect its attorney-client privileged documents from seizure during the course of the inspection. If DEQ nevertheless seizes the legal opinion, the violation of Clean Co.'s Fifth and Sixth Amendment rights will provide a basis for suppression of the document and may even require dismissal of the regulatory action.[39]

Practice Tips

Given the risks that flow from civil and regulatory investigations, you need to understand fully the protections available to preserve your clients' constitutional and other rights. You should also be aware of when your corporate clients' rights and duties may conflict with the rights of employees and former employees. To avoid such conflicts, you may counsel your corporate clients to designate document custodians who have no independent criminal liability. When such designation is not possible, the safest option is probably to obtain separate counsel for the employee while counseling the corporation on its rights and duties with respect to the production of corporate records. You should advise corporate clients to clearly mark all attorney-client confidential materials.

When you represent a client in a civil or regulatory investigation, it is impor-

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tant to investigate whether a parallel criminal investigation is ongoing or likely. You may start by simply asking the civil or regulatory investigators if they are working with criminal enforcement authorities and contacting the prosecutors with jurisdiction. But, to fully understand your client's rights and risks, you must thoroughly evaluate the applicable facts and law of the client's case to determine if they might give rise to criminal charges. If so, you must assume a parallel criminal investigation is likely and take steps to analyze and protect your client's constitutional rights. ❐

Endnotes

1 Article I, section 9 provides:

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

See also ORS 133.545 et seq. (limiting state's ability to search or seize persons or places).

2 The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3 *State v. Rivas,* 100 Or. App. 620, 623, 788 P.2d 464 (1990); *Hale v. Henkel*, 201 U.S. 43 (1906). You should be aware that the protections afforded by ORS 133.545 et seq., article I, section 9 and the Fourth Amendment, while similar, are not identical. *State v. Caraher,* 293 Or. 741, 756, 653 P.2d 942 (Or. 1982) (en banc) ("citizens of Oregon are entitled to an analysis of the protections afforded by the Oregon constitution independent of the United States Constitution"). So, when both Oregon and U.S. constitutional rights are implicated—e.g., when a state agency or police officer conducts the search or seizure at issue—you must evaluate possible violations of your client's rights in the following order: (1) state statutory rights, (2) article I, section 9 rights, and finally (3) Fourth Amendment rights.

4 *State v. Miller,* 269 Or. 328, 334, 524 P.2d 1399 (Or. 1974); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). *But see California v. Acevedo,* 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (observing that "warrant requirement ha[s] become so riddled with exceptions that it [i]s basically unrecognizable").

5 *Marshall v. Barlow's Inc.,* 436 U.S. 307, 311 (1977); *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 352-359 (1977) (warrant requirements applicable to individuals apply when commercial property is searched for contraband or evidence of crime).

6 *Rivas,* 100 Or. App. at 623-24 (warrantless search of restaurant kitchen violated Art. I, sect. 9 privacy interest of employee working in kitchen); *State v. Tanner,* 304 Or. 312, 321, 745 P.2d 757 (Or. 1987) (entrustment of stolen video tape to third party established Art. I, sect. 9 privacy interest that was violated when tape was discovered through unlawful search of third party's residence even though defendant did not control access to residence). To establish a Fourth Amendment privacy interest, a person would have to show that he or she personally had an expectation of privacy in the place searched based on concepts of real or personal property or understandings recognized or permitted by society. *Minnesota v. Carter,* 525 U.S. 83 (1998) (short time visitor to apartment had no privacy interest in apartment). Unlike the article I, section 9 privacy interest, the Fourth Amendment privacy interest may not include an interest in a place over which the person has no control. *Rawlings v. Kentucky,* 448 U.S. 98, 105 (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); *but see United States v. Johns,* 707 F.2d 1093, 1100 (stating that power to exclude others is not determinative of Fourth Amendment privacy interest) (9th Cir 1983), rev'd on other grounds, 469 U.S. 478 (1985).

7 *State v. Boyanovsky,* 304 Or. 131, 133-34, 743 P.2d 711 (Or. 1987) (article I, section 9 applies to purportedly "administrative" sobriety checkpoint searches); *Marshall*, 436 U.S. 307 (1978); *See v. City of Seattle,* 387 U.S. 541 (1967).

8 *See, e.g.,* ORS 459.385 (authorizing DEQ to enter premises, access and copy records, and take samples; not authorizing interrogations); ORS 466.195 (same). As discussed below, employees, even in their corporate capacity, have article I, section 12 and Fifth Amendment rights to be free from compelled oral statements that would be personally incriminating.

9 *United States v. Biswell,* 406 U.S. 311 (1972) (upholding constitutionality of warrantless search of pawn shop owner's locked gun storeroom pursuant to Federal Gun Control

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Act); *State v. Westside Fish Co.,* 31 Or. App. 299, 570 P.2d 401 (Or. App. 1977) (approving of *Biswell* and upholding under article I, section 9 Fish and Game Commission warrantless search of premises of licensed fish canner and wholesale fish dealer pursuant to statutory investigatory powers). See also *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1969) (liquor industry is pervasively regulated); *Donovan v. Dewey,* 452 U.S. 594 (1981) (mining industry is pervasively regulated).

10 *New York v. Burger,* 482 U.S. 691, 702-03 (1987); *State v. Saunders,* 103 Or. App. 488, 493-94, 799 P.2d 159 (Or. App. 1990) (analyzing lawfulness under article I, section 9 based on factors articulated in Burger); *see also Biswell,* 406 U.S. at 316 (articulating different factors that emphasize importance and pervasiveness of regulatory scheme); *Westside Fish Co.,* 31 Or. App. at 302 (following *Biswell*).

11 Under article I, section 9 jurisprudence, if the consequences of the search are criminal sanctions the search may not be "administrative" in nature regardless of whether it is purportedly conducted pursuant to a statutory or regulatory scheme. *See* cases discussed at notes 16 and 17 below.

12 *See Saunders,* 103 Or. App. at 493-94 (holding warrantless search unconstitutional under article I, section 9 when statutory scheme did not provide specifically for routine inspections that are limited in scope).

13 *Camara v. Municipal Court,* 387 U.S. 523 (1967) (lower probable cause standard reasonable for administrative searches pursuant to municipal housing code); *State Accident Prevention Division of Worker's Compensation Board v. Foster,* 31 Or. App. 251, 258, 570 P.2d 398 (1977) (approving of *Camara* and adopting a "a sliding scale of evidence/probable cause" for analysis of administrative searches under article I, section 9).

14 *State Accident Prevention,* 31 Or. App. at 257.

15 Civil and regulatory inducements to waive constitutional rights are common. *See, e.g.,* ORS 465.503 (exemption from action to compel removal not available to dry cleaning operator who denies government agency access to premises); Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecutions of Business Organizations, to Heads of Department Components, United States Attorneys (Jan. 20, 2003), available at *http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm* (cooperation is primary factor in determining whether or not to do criminal referral or initiate criminal investigation).

16 *See, e.g., State v. Boyanovsky,* 304 Or. 131, 133-34, 743 P.2d 711 (Or. 1987); see also *Saunders,* 103 Or. App. at 493-94 (article I, section 9 requires warrant be based on probable cause when purpose of statute is to search for evidence of criminal violation of commercial fishing laws); *Commonwealth v. Frodma,* 436 N.E.2d 925 (Sup. Jud. Ct. Mass. 1982) (search with "presupposition of criminal activity" using administrative search warrant issued on lesser probable cause standard would be "fatally flawed").

17 *See, e.g., Nelson v. Lane County,* 304 Or. 97, 101, 104, 743 P.2d 692 (1987).

18 Parallel investigations are common and are not, in and of themselves, unlawful. See *United States v. Kordel,* 397 U.S. 1, 11 (1970); *SEC v. Dresser Indus., Inc.,* 628 F.2d 1368 (D.C. Cir. 1980) (en banc).

19 Impropriety in the administrative investigation includes affirmative misrepresentations, deceit or trickery about the status of the investigation. *See United States v. Stringer,* 408 F. Supp. 2d 1083, 1092 (D. Or. 2006) (dismissing indictment largely on basis of active deception regarding criminal investigation); *Abel v. United States,* 362 U.S. 217 (1960) (deliberate use of administrative search warrant to gather evidence for criminal case "must meet stern resistance by courts"); *United States v. Bulacan,* 156 F.3d 963, 967-74 (9th Cir. 1998) (suppressing evidence because purported administrative search had impermissible criminal investigative purpose). *See also United States v. Knights,* 219 F.3d 1138, 1141 (9th Cir. 2000) (legality of probation searches dependent on whether search was true probation search or criminal investigation for law enforcement).

20 Article I, section 12, of the Oregon constitution provides, in part, that "No person shall … be compelled in any criminal prosecution to testify against himself." The Fifth Amendment provides, in part, that "[n]o person … shall be compelled in any criminal case to be a witness against himself."

21 *State ex rel. Juvenile Dept. of Lincoln County v. Cook,* 138 Or. App. 401, 407, 909 P.2d 202 (Or. App. 1996) (observing article I, section 12 and Fifth Amendment may be effectively invoked or waived only by individual holding those rights); *Hale,* 201 U.S. 43.

22 *State v. Langan,* 718 P.2d 719, 722 (Or.

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1986); *Kastigar v. United States,* 406 U.S. 441, 444-45 (1972).

23 *See Kordel,* 397 US at 9. However, because individuals have a right not to incriminate themselves in compelled sworn statements, even those made in their capacity as corporate employees, when no authorized person at a corporation can answer interrogatories addressed to the corporation without personally incriminating themselves, the appropriate remedy is a protective order postponing the civil discovery until termination of the criminal action. *Id.*

24 *Braswell v. United States,* 487 US 99, 109-10 (1988). Keep in mind that not only the content of documents, but also the act of producing documents, may have incriminating testimonial significance—for example, compliance with a subpoena may tacitly concede the existence of the documents demanded, their possession or control by the individual or entity producing them, and the producing individual's or entity's belief that the papers are those described in the subpoena. *See United States v. Doe,* 465 U.S. at 613, n. 11.

25 *Cook,* 138 Or. App. at 407; *United States v. Darwin Const. Co.,* 873 F.2d 750 (4th Cir. 1989).

26 A "custodian of corporate records" is any agent of the corporation who under ordinary principles of corporate law has custody or control over corporate documents. *In re Sealed Case,* 877 F.2d 83, 86 (D.C. Cir. 1989).

27 *Braswell,* 487 U.S. at 109-10, 118. Note that the unavailability of the Fifth Amendment privilege against production does not hinge on whether the subpoena is addressed to the corporation or the custodian. *Dreier v. United States,* 221 U.S. 394, 400 (1911); *Braswell,* 487 U.S. at 109-10.

28 *United States v. Lawn Builders of New England, Inc.,* 856 F.2d 388, 394 (1st Cir. 1988); *United States v. O'Henry's Film Works, Inc.,* 598 F.2d 313, 318 (2d Cir. 1979).

29 *In re Grand Jury Proceedings (John Doe Co., Inc.),* 838 F.2d 624, 626 (1st Cir. 1988). The rationale behind such compelled oral testimony is that, because the act of producing the records is a representation that the documents are those demanded by the subpoena, oral identification merely makes explicit what is implicit in the production.

30 Note that article I, section 12 requires transactional immunity as a substitute for the right not to testify against oneself. *See State v. Soriano,* 68 Or. App. 642, 662-63 (holding that use and derivative use immunity does not clearly protect against non-evidentiary and evidentiary use of immunized testimony and therefore cannot substitute for right not to testify against oneself), *aff'd,* 298 Or. 392, 693 P.2d 26 (Or. 1984).

31 The Oregon bill of rights is not derivative of the federal bill of rights, and, even if it were, Oregon is not bound to apply federal bill of rights precedence to the Oregon bill of rights. *Caraher,* 293 Or. at 756; *Soriano,* 68 Or. App. at 645-46.

32 *See Matter of John Doe Grand Jury Investigation,* 418 Mass. 549, 637 N.E.2d 858 (Mass. 1994).

33 While no Oregon cases address the sworn testimony of corporate representatives, it is well-established under Oregon law that the right against compelled self-incrimination is not self-executing—i.e., failure of the witness to assert the privilege is a waiver. *State v. Tenbusch,* 886 P.2d 1077 (Or. App. 1994); *see also Kordel,* 397 U.S. at 7-8 (employee has individual Fifth Amendment privilege against compelled incriminatory answers to interrogatories).

34 *See United States v. Doe,* 465 U.S. 605, 611-12 (1984) ("'[T]he Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.'" (quoting *Fisher v. United States,* 425 U.S. 391, 409-10 (1976)). Doe concluded that the contents of the taxpayer's documents were not privileged absent a showing that the owner "prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents." *Id.* (footnotes omitted). *State v. Jancsek,* 302 Or. 270, 284-85, 730 P.2d 14 (letter that was voluntarily created and non-privileged could not be compelled). Note that *Jancsek* expressly did not address whether the contents of a voluntarily created, but privileged, communication may be protected against compulsory production under article I, section 12. *Id.* at 285, n.8.

35 *In re Grand Jury Subpoena,* dated April 18, 2003, 383 F.3d 905, 910-13 (9th Cir. 2004); *In re Grand Jury Proceedings (Mora),* 71 F.3d 723, 724 (9th Cir. 1995); *see also In re Grand Jury Subpoenas Duces Tecum,* dated June 13, 1983 and June 22, 1983, 722 F.2d 981, 986-87 (2d Cir. 1983). Oregon courts have not addressed the "foregone conclusion rule."

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36 *Weatherford v. Bursey,* 429 U.S. 545 (1977) (government intrusion on attorney-client relationship seriously undermines defendant's Sixth Amendment right to counsel that is necessary for effective legal representation and fair trial); *United States v. Fortna,* 796 F.2d 724, 731, 732 (5th Cir.), *cert. denied,* 479 U.S. 950 (1986) (government violates Fifth Amendment due process rights when it tramples on attorney-client relationship by obtaining confidential attorney-client communications and using information therein to defendant's detriment).

37 *Noble v. Union River Logging R. Co.,* 147 U.S. 165, 176 (1893) (recognizing Fifth Amendment due process right of corporation); *United States v. Rad-O-Lite of Philadelphia, Inc.,* 612 F.2d 740, 743 (3d Cir. 1979) (recognizing Sixth Amendment right to effective assistance of counsel applies to corporations). The Oregon constitution does not have a due process clause and no Oregon cases have recognized a corporation's right to effective assistance of counsel under article I, section 11.

38 Note that the Sixth Amendment right does not attach until "at or after the initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *United States v. Gouveia,* 467 U.S. 180, 188-89 (1984).

39 *See United States v. Marshank,* 777 F. Supp. 1507, 1521-22 (N.D. Cal. 1991) (observing that suppression is the appropriate remedy for Fifth Amendment violation except when continuing prejudice from violation cannot be remedied by suppression).

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Sarah Hackbart
Oregon State Bar
503-620-0222
(800-452-8260), extension 385
Email: shackbart@osbar.org.