Broken Principle: Solving the Corporate Privilege Waiver Dilemma

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By Don R. Berthiaume

For almost 10 years, corporations have lived under the specter of a Department of Justice policy that, depending on the atmosphere, has at times mandated that corporate cooperation in criminal investigations depends upon waiver of the attorney-client privilege and work-product protection.

Regardless of what the policy states, one thing is certain. If a corporation wants to cooperate with the government during a criminal investigation of itself, it must share with the government facts that are developed through attorney-client privileged communications and analyzed and delivered to the corporation through attorney-work product.

Consequently, the answer to the corporate privilege waiver dilemma is not a new and improved Department of Justice policy, but the creation of a legal mechanism that allows a corporation to provide factual information to the government without waiving the attorney-client privilege or work-product protection. The framework of just such a mechanism already exists in Fed. R. Civ. P. 30(b)(6) and its accompanying case law.

Fed. R. Civ. P. 30(b)(6) provides that a party, in its notice or subpoena, may: “Name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization.”

As the Rule alludes, it is not literally possible to take the deposition of a corporation; instead the information sought must come from a natural person. As a consequence, the person designated to personify the corporation does not give his personal opinions. Rather, the designee “presents the corporation’s position on the topic” and the testimony elicited from the deponent at the deposition represents the knowledge of the corporation.

Furthermore, no one would argue that a 30(b)(6) witness waives the attorney-client privilege by testifying under a requirement of the Federal Rules of Civil Procedure.

If the government adopts a similar rule into the Federal Rules of Criminal Procedure, the privilege waiver issues inherent in corporate criminal prosecutions should be resolved. Such a rule could state: “An organization at its discretion may, when notified by any governmental agency that it is under investigation, designate one or more officers, directors, or managing agents, or designate other persons who consent to proffer on its behalf in negotiations with the governmental agency. The persons designated must proffer about information known or reasonably available to the organization. And, in the event of a subsequent civil action brought against the organization by a third party, such designated persons may, if available, be among the designated witnesses in any subpoena issued under Fed. R. Civ. P. 30(b)(6).”

This rule has many benefits. For instance:

• It does not require the corporation to provide a witness to proffer with the government. Instead, it is discretionary and can only be used if the corporation decides to cooperate;

• If the corporation decides to cooperate, the designee will personify the corporation and allow it to proffer information to the government and allow the corporation to enter into a proffer agreement;

• If asked questions, such as how did the corporation discover information, corporate counsel can interrupt the question on privilege grounds;

• The corporation will be held to the same standards of cooperation as a natural subject/target and cooperation will be based on what information the corporation provides, not whether it waived privilege; and

• If the corporation, through its designee, willfully makes false statements during the proffer, the government could charge the corporation with perjury, obstruction of justice, making false statements, or violating any other applicable criminal statutes relating to the giving of false statements.

No matter what improvements the
Department of Justice makes to its corporate charging policy, it will always be imperfect because it cannot solve the dilemma of how to communicate facts to the government without destroying a corporation’s legal protections.

Consequently, the development of a mechanism by which corporations can cooperate with the government and give it the facts it requires is necessary. By adopting a rule similar to Fed. R. Civ. P. 30(b) (6), corporate criminal defendants will be treated analogously to natural ones and will gain the benefits of full cooperation or face the detriments of noncooperation.