Just the Facts: Solving the Corporate Privilege Waiver Dilemma

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It has been said that “corporations have neither bodies to be punished nor souls to be damned.”[1] The United States Department of Justice, Siemens AG and Arthur Anderson LLP might beg to differ, though, as the government has repeatedly proven that corporations can be punished through multi-million dollar fines[2] and, in some cases, put to death by a simple indictment.[3]

Corporations facing criminal investigations often have much to gain by cooperating with the Justice Department. However, the Department of Justice has made clear that in order for a corporation to be considered “cooperative” in criminal prosecutions it wants access to “the facts” developed in corporate internal investigations.[4] As Shakespeare would say, “Herein lies the rub”: such facts are typically ascertained in a manner that places them under the protection of the attorney-client privilege and/or work product doctrine, thereby making it difficult to share the information with prosecutors.

How can corporations provide “just the facts” — which are, in fact, not privileged[5] — without waiving the attorney-client privilege and work product protection? This article argues for an addition to the Federal Rules of Criminal Procedure based upon Rule 30(b)(6) of the Federal Rules of Civil Procedure, which allows civil litigants to issue a subpoena to an organization and cause them to “designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf … about information known or reasonably available to the organization.”[6] Why should we look to Fed. R. Civ. P. 30(b)(6)? Rule 30(b)(6) answered a similar problem faced by corporations as civil defendants prior to its adoption in 1970: how to provide factual answers to opposing counsel in a judicially efficient manner. With Rule 30(b)(6) serving as its template, the rule proposed by this article will allow corporations to provide “the facts” to the government without waiving the attorney-client privilege and work product protection, thus solving the concerns with privilege waiver that resound through the white collar criminal bar.

This article is organized as follows. Part I provides a brief history of the “principles of Federal Prosecution of Business Organizations.” Part II discusses the Attorney-Client Privilege’s and Work Product Doctrine’s application to business organizations. Part III then delineates the problems with privilege waiver and Part IV proposes a solution to those problems.

I. A Brief History of the “Principles of Federal Prosecution of Business Organizations”

Hornbook law provides that “the public has a right to every man’s evidence”[7] and that the Fifth Amendment right against self-incrimination does not apply to corporations.[8] Nevertheless, corporations do enjoy the right to have privileged communications with their attorneys and have their counsels’ notes, mental impressions, and other products protected by the work-product doctrine.[9] Through these judicially created doctrines corporations try to shield themselves from self-incrimination.[10]
In 1999, before names like Enron, Adelphia, and WorldCom became synonymous with corporate malfeasance, then Deputy Attorney General Eric Holder issued a memorandum entitled “Federal Prosecution of Corporations”[11] to provide guidance in the charging decisions of federal prosecutors seeking to develop cases against corporations. The Holder memorandum contains eight principles to consider when determining whether to charge a corporation with a criminal offense. While most of the principles were benign, the fourth principle would come to cause defense attorneys and their corporate clients much consternation. It stated that prosecutors should consider “the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges”[12] when evaluating whether to bring criminal charges against the corporation.

After the corporate scandals that plagued the United States in the beginning of the 21st century, then Deputy Attorney General Larry Thompson updated the Holder memorandum in 2003.[13] Where the Holder memorandum appeared on its face to be advisory, the Thompson memorandum made it official Justice Department policy for prosecutors to apply the principles in all corporate prosecutions.[14] This requirement created an atmosphere where corporations believed that the only way they could avoid indictment — and, perhaps a corporate death sentence — would be for them to cooperate fully and waive the attorney-client privilege and work-product protections.

Then, in 2004, the Department of Justice’s policies were buttressed by the United States Sentencing Commission when it amended the commentary to section 8C2.5 of the United States Sentencing Guidelines to state: “Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”[15] Thus, privilege waiver was no longer just part of the Department of Justice's charging decision, but an integral part of the Court's sentencing equation.

As a result, a “culture of waiver”[16] arose out of the Thompson memorandum and the United States Sentencing Guidelines and remains to this day. From this perceived “culture of waiver” the government received its harshest criticisms. Recent court decisions, such as United States v. Stein,[17] a potential legislative remedy with Congress's introduction of the Attorney-Client Privilege Protection Act of 2007,[18] and the United States Sentencing Commission’s repeal of the 2004 Amendment in April 2006[19] highlighted the concerns of many[20] that the scales had tipped too much in the government's favor.

Undeterred by the bad press, courtroom losses, the Sentencing Commission, and Congress, the Department of Justice took steps to remedy the “issues” associated with the Thompson memorandum in December 2006 by updating and rewriting it. This new memorandum, drafted by then Deputy Attorney General Paul McNulty, attempted to placate the Department of Justice’s critics by incorporating safeguards to combat the alleged abuse of waiver requests by government prosecutors.[21]

The safeguards developed in the McNulty memorandum required prosecutors to have legitimate needs for the privileged information and to seek permission from higher authorities prior to requesting privileged materials from corporations under investigation.[22] In an uncited reference to In re Grand Jury Investigation,[23] the Department of Justice distinguished between “factual work product,” which it referred to as “Category I documents” and “opinion work product,” which it referred to as “Category II documents.”[24]

According to the McNulty memorandum, “Category I” documents included:
(i) copies of key documents; (ii) witness statements; (iii) purely factual interview memoranda; (iv) organization charts created by company counsel; (v) factual chronologies; and (vi) factual summaries or reports containing investigative facts documented by counsel.[25]

“Category II” documents, on the other hand, included:

(i) legal advice given to corporations before, during, and after the underlying misconduct occurred; (ii) attorney's notes, memoranda, or reports (or portions thereof) containing counsel's mental impressions and conclusions; (iii) legal determinations reached as a result of an internal investigation; and (iv) legal advice given to corporations.[26]

Despite these efforts and the Department of Justice's continued attempts to stress that it did not consider waiver of a corporation's attorney-client and work product protection an absolute requirement[27] in evaluating a corporation's cooperation, an “alliance of business, legal and civil liberties groups” continued to fight against the Department's waiver policies.[28] Consequently, the battle over privilege waiver continued until, once again, the Department of Justice updated the Holder/Thompson/McNulty memorandum on August 28, 2008.

This time, Deputy Attorney General Mark Filip was tasked with the responsibility of drafting the new “Principles of Federal Prosecution of Business Organizations.”[29] Unlike previous iterations of the policies, Filip did not, like Holder, Thompson, or McNulty before him, draft an introductory memorandum. Instead, his reworked policies were incorporated directly into the United States Attorney Manual and, consequently, received less fanfare than the previous memorandums.

The Filip memorandum did away with the McNulty memorandum's two-tiered approach to privileged documents and incorporated a much more clear and concise cooperation policy:

The government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information — not whether the corporation discloses attorney-client or work product materials.[30]

This approach is less contentious than the previous memoranda and focuses on what is most important: the facts. Since the Filip memorandum appears to end, once and for all, the privilege waiver issue, we must answer the question: how does a corporation turn over just the “facts” without waiving the very privileges and protections it needs to survive?

II. The Attorney-Client Privilege and Work Product Doctrine in White Collar Cases

In the aftermath of the Watergate scandal of the mid-1970's, the Office of the Watergate Special Prosecutor discovered that some corporations were making illegal contributions to political campaigns and bribing foreign officials.[31] At around the same time, the SEC indicated that it would likely refrain from taking enforcement action against companies that immediately disclosed making questionable payments.[32] Consequently, many corporations, through counsel, took steps to discover whether such activity was taking place within their organizations and the modern internal investigation was born.[33] It was amongst this backdrop that the law surrounding attorney-client privilege and work product doctrine in corporate settings developed.

Since then, it has been accepted that the attorney-client privilege applies not only to “human” clients, but
also corporate ones, and it protects from disclosure communications between an attorney and his or her corporate client.[34] As an initial matter, the privilege applies only if

1. the asserted holder of the privilege is or sought to become a client;
2. the person to whom the communication was made is a member of the bar of a court, or his subordinate and is in connection with this communication acting as a lawyer;
3. the communication relates to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding; and
4. the privilege has been claimed and not waived.[35]

Simultaneously though, the privilege “obstructs the search for the truth and because its benefits are, at best indirect and speculative,” courts construe it as narrowly as possible.[36] Thus, the “central inquiry is whether the communication was made by a client to an attorney for the purpose of obtaining legal advice.”[37]

Until 1981, when the Supreme Court decided *Upjohn Co. v. United States*,[38] the Circuits were employing two tests to determine the applicability of the attorney-client privilege in prosecutions of corporate entities: the “control group” test and the “subject matter” test. Under the “control group” test, only communications with those employees who played a substantial role in deciding and directing the corporation’s response to legal advice were privileged.[39] The “subject matter” test, on the other hand, protected only those communications between counsel and a corporate agent where the communication related to information the agent acquired in the ordinary course of business and related to the subject matter of his employment.[40]

Because a corporation is a fictitious legal entity that cannot speak for itself and can only do so through the employees who represent its interests,[41] the *Upjohn* Court held that the communications between a corporation’s employees, regardless of rank or position, and counsel are protected by the attorney-client privilege.[42] But, the privilege only protects the disclosure of the communications, not the “disclosure of the underlying facts by those who communicated with the attorney.”[43] Thus, “the [corporate] client cannot be compelled to answer the question, ‘what did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within [the corporation’s] knowledge merely because [it] incorporated a statement of such fact into his communication to [its] attorney.”[44]

While the “protective cloak of the attorney-client privilege” may protect communications between counsel and client, it “does not extend to information which an attorney secures from a witness while acting for his [corporate] client in anticipation of litigation;”[45] nor does it apply to notes, memoranda, or other writings prepared by counsel during such interviews.[46] Nonetheless, these materials may, under certain circumstances, be protected from disclosure by the work-product doctrine.[47]

The work product doctrine protects from discovery documents prepared in anticipation of litigation — or for trial — by or for another party or by or for that party’s attorneys[48] and includes ‘materials’ obtained, prepared by, and prepared for counsel,[49] such as (i) correspondence, (ii) witness statements, and (iii) certain types of investigatory reports.[50]

On the other hand, materials prepared or “assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes,” lack protection.[51] Thus, “not only must the primary motivating purpose behind the creation of the document or investigative report … be to aid in … litigation in order to be deemed protected, the document must also be of a legal nature and primarily con-
cerned with legal assistance; technical information is otherwise discoverable.”[52]

The work product doctrine protects “the results of internal corporate reviews, whether undertaken at the direction of in-house counsel or outside counsel.”[53] However, the protection is qualified and not absolute.[54] Thus, interview memoranda produced during internal investigations (or otherwise) may be discoverable by the government if they can show “good cause” to overcome the work product protection; however, this will be the rare situations, such as when the person interviewed is unavailable or dead.[55]

When taken in conjunction with the Supreme Court's decision in Upjohn — which held that communications between employees and counsel are protected by the attorney-client privilege — any notes, memoranda, reports or other materials created during an internal investigation are protected from disclosure because they contain client communications and were obtained in anticipation of litigation. Thus, the government can only gain access to these materials in the rare situations described above or, more commonly, and as discussed in Part I, through a corporation's willingness to waive privilege.[56]

III. The Problem with Privilege Waivers

Commentators have advanced many arguments decrying corporate privilege waivers since the Department of Justice's adoption of the Holder memorandum and its progeny over ten years ago.[57] The principle arguments posit that (i) the attorney-client privilege is sacrosanct, (ii) privilege waiver does more harm than good, and (iii) waiver exposes the corporation to vulnerability in third-party litigation.[58] At their core is an allegation that the government is forcing or coercing corporations to waive the privilege.

One finds wide agreement that the “attorney-client privilege is sacrosanct.”[59] Its venerated status rests on the following assertions: (i) it encourages clients to communicate fully and frankly with their attorneys and seek legal counsel, (ii) it assists lawyers in providing competent counsel, (iii) it promotes compliance with the law by allowing lawyers and clients to discuss issues freely in an effort to resolve legal problems, and (iv) it promotes the ultimate ends of justice by fostering informed and vigorous advice and advocacy.[60] Consequently, “any intrusion” on the privilege, such as allowing the government to force corporations to waive its attorney-client privilege is wrong.[61]

Its detractors contend that privilege waiver does more harm than good.[62] For example, privilege waivers may (i) discourage corporate insiders' from conducting routine consultations with corporate counsel before engaging activities because he or she may fear their discussions with counsel will be provided to prosecutors; (ii) discourage compliance programs because the corporation may not want to uncover wrongdoing for fear it will be turned over to the government; (iii) discourage internal investigations “because the materials generated by the investigation may be used against the company and its employees in a future criminal case;” and (iv) discourage employees from cooperating with internal investigations for fear that any statements the employees make in the internal investigation will be turned over to the government and used against them in a later criminal prosecution.[63]

Finally, waiving the attorney-client privilege or work product protection could allow third-party plaintiffs to gain access to the corporations otherwise protected materials.[64] “Because confidentiality is key to the privilege, ‘the attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third-party.’”[65] Similarly, “the protection provided by the work product doctrine is not absolute and it may be waived” and disclosing work product to an adversary will relinquish any protection the doctrine offers.[66]
If a corporation discloses its attorney-client privileged and work product materials to the Department of Justice, it forfeits the protections. Once the protections are forfeited, third-party litigants, such as those in shareholder derivative suits, will be able access those previously protected materials and such a result could potentially lead the corporation to suffer huge monetary losses.

IV. A Novel Approach to the Waiver Problem

Since the government now wants only “the facts,” we need a mechanism through which the corporation shares the desired information without waiving the attorney-client privilege and/or work product protection. Fed. R. Civ. P. 30(b)(6) provides the framework for the development of just such a tool.

Fed. R. Civ. P. 30(b)(6) provides that a party, in its notice or subpoena, may

[n]ame 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. The designee's testimony is, therefore, distinguishable from that of a corporate employee, whose deposition is not considered to be the corporation's.

“If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.” Consequently, a 30(b)(6) deponent has an “affirmative obligation to educate himself as to the matters regarding the corporation” because the Rule “implicitly requires persons to review all matters known or reasonably available to [the corporation] in preparation for the 30(b)(6) deposition.” The Rule was not, however, designed to be a memory contest; instead, “such preparation is necessary because the deposed individuals are required to testify to the knowledge of the corporation” and be prepared to give complete and binding answers its behalf.

Interestingly, Rule 30(b)(6) was “added in 1970 in order to avoid the difficulties encountered on both sides when the examining party is unable to determine who within the corporation would be best able to provide the information sought, to avoid the ‘bandying’ by corporations where individual officers disclaim knowledge of facts clearly known to the corporation, and to assist corporations which found an unnecessarily large number of their officers and agents were being deposed.”

The problems that Rule 30(b)(6) addressed are, at their core, no different than the problems facing the prosecutors and corporations embroiled in white collar criminal investigations today. For instance, the government often seeks to identify the individuals responsible for causing the underlying criminal conduct, but it does not want to conduct pointless interviews of corporate employees who invariably deny knowledge of the alleged conduct. Consequently, this article proposes that a rule similar to Fed. R. Civ. P. 30(b)(6) should be adopted into the Federal Rules of Criminal Procedure and that it states:
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 must, if available, be among the designated witnesses in any subpoena issued under Fed. R. Civ. P. 30(b)(6).

This proposed rule will allow an individual to personify the corporation and provide it a voice by which it can proffer to the government the factual information it seeks without waiving either the attorney-client privilege or work product protection. Such a “corporate proffer” is akin to a standard government proffer involving a natural defendant. As such, the corporation can, through its designee, enter into a proffer agreement with the Department of Justice, which would protect the interests of both parties.

Under a standard proffer agreement, the government would agree with the corporation that nothing that the designee stated to the government on its behalf could be used directly or indirectly against the corporation. At the same time, the government would reserve the right to use the information gained in the proffer session against others and against the corporation’s witnesses — if it chose to go to trial — for the limited purpose of impeachment.

Cooperation would also affirmatively not be based on waiver of the attorney-client privilege and work product protection. Instead, the government would be able to judge the corporation's commitment in assisting the government by its actions — the same way it assesses a natural defendant's cooperation. For example, the government can immediately determine if the corporation adequately prepared the designee, based upon the designee's disclosures to the government, the depth of the designee's knowledge of the facts, and the designee's ability to answer questions. This puts the corporation on the same level as a natural defendant who is providing information to the government and falls in line with the Filip memorandum's objective of treating corporations like individuals when assessing cooperation and credibility.

Furthermore, 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 with violating any other applicable criminal statutes relating to the giving of false statements. In such a prosecution the government could use the corporation's proffer statements at any stage of the prosecution, including in the grand jury and all phases of any resulting trial. It would be in the corporation's best interest to provide the government with truthful information in the proffer and not falsify, conceal, or cover up a material fact, make any materially false, fictitious, or fraudulent statements or representations, or make or use any false writings or documents knowing that they contained materially false, fictitious, or fraudulent statements or entries. If convicted of any such offenses, the corporation could be punished by criminal fines, debarment from government contracts, placed on corporate probation, and suffer a myriad of other penalties.

As the designee represents the corporation, and his or her statements to the government represent the corporation's knowledge — and not his or her own, the designee should be afforded some qualified immunity for being the corporation's mouthpiece. The qualified immunity would protect the designee from prosecution for the information conveyed to the government. However, such immunity would be lost, and the designee prosecutable, if evidence surfaced that the designee knowingly proffered false information to the government.

The proposed rule also seeks to protect plaintiffs’ rights and maintain judicial consistency by requiring cor-
poration's to make the same designees available in any subsequent civil action brought by third-party plaintiffs. This will help insure that the proffered information given to the government will be the same, or similar to, the testimony given in a Rule 30(b)(6) deposition.

V. Conclusion

In truth, neither side of the privilege waiver debate is wrong. The Department of Justice is correct in requiring corporations to provide facts; after all, that is the very essence of cooperation. And, at the same time, corporations are equally correct when they state that providing “just the facts” causes them to waive the attorney-client privilege and work product protection. Consequently, no matter what improvements the Department of Justice makes to its “Principles of Federal Prosecution of Business Organizations,” it will always be imperfect because it cannot solve the dilemma of how to communicate facts to the government without destroying the legal protections corporations are entitled to.

Without a new mechanism providing a method by which corporations can cooperate with the government and give it the facts it needs, this dilemma will never be resolved and this exhausted debate will linger. This article provides that answer. By adopting the proposed new Rule into the Federal Rules of Criminal Procedure, corporate defendants will be treated analogously to human ones and will gain the benefits of full cooperation or face the detriments if they choose to act in bad faith. In effect, the adoption of this rule will allow the Department of Justice's approach to corporate defendants to be harmonized with its approach to human ones: equally and fairly.

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[FN7] Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 12–13 (5th ed. 2007) (“For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.” (quoting 8 Wigmore on Evidence § 2291, at 545 (McNaughton ed. 1961)).


[FN12] Holder memorandum, supra note 11. The other principles were: (1) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime; (2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management; (3) the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it; (4) the existence and adequacy of the corporation's compliance program; (5) the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies; (6) collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and (7) the adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.


[FN16] Marcia Coyle, Lawyer's Fear a Culture of Waiver, Nat'l L.J., Mar. 24, 2006, available at ht-


[FN20] There are literally dozens of articles, client alerts, media reports, and other materials critical of the Department of Justice's policies. One merely has to go to Google and run the query “McNulty memorandum” to see the results. For my own client alert on the issue, please visit http://www.venable.com/docs/pubs/1616.pdf.


[FN29] See Filip memorandum, supra note 4.


[FN50] Webb et al., supra note 49, § 7.03.


[FN54] In re Grand Jury Subpoena, 599 F.2d at 1231.

[FN55] In re Grand Jury Subpoena, 599 F.2d at 1231.

[FN56] In re Grand Jury Subpoena, 599 F.2d at 1231.


[FN59] One simply has to Google the query “attorney client privilege is sacrosanct” to see the number of commentators who make this claim and to see that it is widely accepted. See http://www.google.com/search?hl=en&q=%22attorney+client+privilege+is+sacrosanct%22.

[FN60] Webb et al., supra note 49, § 6.03.

[FN61] Seigel, supra note 58, at 10.

[FN62] Seigel, supra note 58, at 11.


[FN64] Seigel, supra note 58, at 15.

[FN65] In re Qwest Communications Intern. Inc., 450 F.3d 1179, 1185, 70 Fed. R. Evid. Serv. 492 (10th Cir. 2006) (quoting U.S. v. Ryans, 903 F.2d 731, 741 (10th Cir. 1990)).

[FN66] In re Qwest Communications Int'l, Inc., 450 F.3d at 1186.


[FN68] In re Qwest Communications Int'l, Inc., 450 F.3d at 1201.

[FN69] See Filip memorandum, supra note 4.


[FN84] See Filip memorandum, supra note 4.


[FN86] This article proposes that the designee would also be entitled to an affirmative defense based on reliance.
