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COMPELLING A CORPORATION TO PRODUCE PRIVILEGED DOCUMENTS IN INDIVIDUAL PROSECUTIONS: *A CRITIQUE OF THE EMERGING COMPROMISE**

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The Supreme Court has declared that the power to assert or waive the corporate attorney client privilege "rests with the corporation's management and is normally exercised by its officers and directors."[1] During and since the corporate scandals of the early 2000's, corporations have often used their power over the privilege by waiving it, typically in an attempt to obtain leniency from government regulators.[2] But more recently, a new conflict concerning the corporate privilege has come to the fore: corporations have begun to assert the corporate privilege over the objection of current or former officers, sometimes in government proceedings arising from corporate misconduct the corporation has already settled, to prevent those individuals from offering corporate privileged information in their defense.[3] This paper examines closely how federal courts are currently resolving the conflict, raises several issues with respect to the current doctrine, and suggests a modest improvement.

I. Current Law

The modern doctrine emerging in the federal courts is illustrated clearly by the case of *United States v. Mix*.

United States v. Mix is one of four criminal prosecutions against former and current employees of BP Plc ("BP") or BP affiliates for alleged misconduct in connection with the Deepwater Horizon oil spill and the government's ensuing criminal investigation, all of which – as of April 11, 2013 – are pending in the U.S. District Court for the Eastern

1 *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985).

2 *See, e.g.*, Abbe D. Lowell & Christopher D. Man, *Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights*, 40 GEO. L.J. ANN. REV. CRIM. PRO. iii, xiv (2011).

3 *See, e.g.*, *United States v. Mix*, No. 12-cr-171, 2012 WL 2420016 (E.D. La. June 26, 2012); *United States v. Weisberg*, No. 08-cr-347, 2011 WL 1327689 (E.D.N.Y. Apr. 5, 2011); *United States v. Renzi*, No. 08-cr-212, 2010 WL 582100 (D. Ariz. Feb. 18, 2010); *United States v. W.R. Grace*, 439 F. Supp. 2d 1125, 1145 (D. Mont. 2006). In a thoughtful treatment of the subject, one commentator has proposed a contractual solution, suggesting that corporate directors can "insist, as part of their employment contracts, that their employers agree to waive the privilege if necessary to the directors' defense" in legal proceedings. Mark A. Kressel, *Making the Advice of Counsel Defense Available for Corporate Directors* (Commentary), 116 Yale L.J. Pocket Part 258, 258 (2007); *see also* Mark A. Kressel, *Contractual Waiver of Corporate Attorney Client Privilege* (Note), 116 Yale L.J. 412 (2006). Without taking a position on the theoretical merits of that approach, this paper focuses on how federal courts are currently handling the issue in the absence of a private agreement.

District of Louisiana.[4] The defendant, Kurt Mix, is a former BP drilling engineer who took part in BP's efforts to halt the flow of oil into the Gulf following the initial drilling rig explosion on April 20, 2010.[5] According to the indictment, in the weeks following the explosion, Mix exchanged text messages with other BP employees and contractors concerning the rate at which oil was flowing from the well and BP's attempts to halt the flow.[6] The indictment further alleged that Mix, despite receiving the legal hold notice that BP issued shortly after the explosion, deleted the text messages from his PDA before BP's internal investigators could image his hard drive.[7] Based on these allegations, the government has charged Mix with two counts of obstruction of justice.[8]

From the outset of the proceedings, Mix has asserted that certain evidence in BP's possession "conclusively demonstrates that [he] did not commit the crimes charged in the Indictment."[9] The problem? The exculpatory evidence is subject to BP's attorney client privilege, which BP has not waived.[10] On May 14, 2012, Mix filed a motion for a protective order to "allow for immediate disclosure and, if necessary, use at trial of exculpatory information" in BP's possession, despite acknowledging that the information he requested is subject to BP's attorney client privilege and that only BP can waive it.[11] In support of his motion, Mix asserted that the Sixth Amendment to the U.S. Constitution entitles him to discover and use exculpatory evidence over BP's assertion of attorney client privilege.[12]

The legal test that Mix proposed to determine what privileged information should be admitted at trial comes from *United States v. W.R. Grace*, in which the U.S. District Court for the District of Montana held that a criminal defendant's Sixth Amendment "right to present evidence" can, in limited circumstances, override a third party's assertion of the attorney client privilege.[13] The test is designed to strike the proper balance between two sometimes incompatible entitlements: the attorney client privilege, the "oldest of the privileges for confidential communications known to the common law,"[14] and the Sixth Amendment to the U.S. Constitution, which "guarantees criminal defendants a meaningful opportunity to present a complete defense."[15] Under the *W.R. Grace* test, a criminal defendant may introduce evidence over a corporation's assertion of attorney client privilege if the evidence is "of such probative and exculpatory value as to compel admission."[16] The court explained that "[s]uch determinations will be made on a document-by-document basis at trial, where the probative value of each bit of evidence

4 As of April 11, 2013, the grand jury has returned three indictments against four individuals for acts relating to the Deepwater Horizon oil spill and the government's ensuing investigation. *See United States v. Mix*, No. 12-cr-171 (E.D. La. May 2, 2012) (drilling engineer indicted for obstruction of justice) (trial scheduled for June 10, 2013); *United States v. Rainey*, No. 12-cr-291 (E.D. La. Nov. 14, 2012) (regional manager indicted for false statements and obstruction of Congress) (trial scheduled for September 15, 2013); *United States v. Kaluza, et al.*, No. 12-cr-265 (E.D. La. Nov. 14, 2012) (drilling supervisors indicted for involuntary manslaughter, seaman's manslaughter, and violations of the Clean Water Act) (joint trial scheduled for January 13, 2014). Of these cases, only *United States v. Mix* has raised issues of corporate privilege.
5 *United States v. Mix*, No. 12-cr-171, slip op. at 1 (E.D. La. Dec. 11, 2012), ECF No. 155.
6 Indictment ¶ 4, *Mix* (May 2, 2012), ECF No. 7.
7 *Id.* ¶¶ 5-16.
8 *Id.* ¶¶ 17-20. On March 20, 2013, the government filed a superseding indictment against Mix, adding allegations that Mix also deleted several voicemails covered by the litigation hold. Superseding Indictment, *Mix* (March 20, 2013), ECF No. 215.
9 Memo. in Support of Def.'s Motion for Prot. Order at 1, *Mix* (May 14, 2012), ECF No. 26-1.
10 Statement of Third-Party Interest at 5, *Mix* (May 30, 2012), ECF No. 43.
11 Memo. in Support of Def.'s Motion for Prot. Order at 57, *Mix* (May 14, 2012), ECF No. 26-1.
12 *Id.* at 5-6 (citing *United States v. W.R. Grace*, 439 F. Supp. 2d 1125, 1145 (D. Mont. 2006)).
13 439 F. Supp. 2d 1125, 1142 (D. Mont. 2006) (holding that scheduled joint trial must be severed because co-defendants – two employees asserting the Sixth Amendment right to present evidence – intended to introduce evidence that another codefendant – the corporation that held the privilege – intended to exclude by asserting privilege).
14 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
15 *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted).
16 439 F. Supp. 2d at 1142.

can be evaluated in the context of the government's case and in light of what the evidence shows."[17] The court also noted that the corporation's interest in confidentiality would be sacrificed only in "limited circumstances."[18]

In response to Mix's motion, the government filed a brief that, although casting doubt on the evidentiary value of any evidence in BP's possession,[19] did not contest the general proposition that Mix's Sixth Amendment rights could, in limited circumstances, trump a third party's claim of attorney client privilege.[20] The government observed that "[n]either the Fifth Circuit nor the United States Supreme Court has directly addressed whether, or in what circumstances, a properly-invoked attorney client privilege may be overcome by a defendant's constitutional rights," and even presented one of its arguments within the framework of the *W.R. Grace* balancing test.[21] The government further acknowledged that "[w]hen a privilege is overcome by a criminal defendant's constitutional rights, the compelled disclosure is not deemed to constitute a general waiver of the third party's privilege."[22]

As the holder of the privilege at issue, BP filed a statement of third-party interest, in which BP took "no position on whether [the materials requested] meet the applicable standard for disclosure."[23] In its statement, BP reaffirmed that the attorney client privilege protects the materials Mix requested,[24] asserted that the attorney client privilege "must be given significant weight" and "need not yield to a [criminal] defendant's request for disclosure,"[25] and requested that any order granting Mix's motion be tailored narrowly and make clear that "BP has not elected to waive its attorney client or work product privileges."[26]

On June 26, 2012, the court ruled on Mix's motion and, essentially, appeased all sides.[27] To begin, the court adopted wholesale the *W.R. Grace* balancing test,[28] and, subject to case-by-case admissibility determinations at trial, granted Mix's motion to obtain exculpatory privileged evidence ("EPI") from BP.[29] In a nod to the government, the court emphasized that it was not ruling on the admissibility of the requested documents, noting that such determinations were impossible at that "relatively nascent stage in the proceedings."[30] Finally, in respect of BP's attorney client privilege, the court limited its order in three important ways:

(1) "Mix is entitled to disclose the EPI only to counsel for the United States in this proceeding,"

(2) "Mix's use and disclosure of the EPI does not vitiate the attorney client privilege that [BP] has over the EPI and [BP] shall not be considered as having waived its attorney client privilege for the EPI or any other privileged information," and

17 *Id.*
18 *Id.* at 1143.
19 United States' Response to Def.'s Motion for Prot. Order at 9-11, *Mix* (May 30, 2012), ECF No. 40.
20 *Id.* at 7.
21 *See id.* at 11 (asserting, after casting doubt on the exculpatory value of any information in BP's possession, that "it is difficult to see how the material the defendant seeks is 'so valuable that to prohibit its admission would violate the defendant's constitutional right to present a defense.'" (quoting *United States v. Weisberg*, No. 08-cr-347, 2011 WL 1327689, at *5 (E.D.N.Y. Apr. 5, 2011) (citing *W.R. Grace*, 439 F. Supp. 2d at 1140-42))).
22 *Id.* at 8 (citing *W.R. Grace*, 439 F. Supp. 2d at 1145).
23 Statement of Third-Party Interest at 1, *Mix* (May 30, 2012), ECF No. 43.
24 *Id.* at 2-3 ("Mix [in his Motion for Protective Order] recognizes that BP holds an attorney client privilege over the requested materials." (quotation marks omitted)).
25 *Id.* at 3-4 (observing that "[t]he attorney client privilege['s] position is 'special' and 'venerated' and courts are particularly mindful to guard against needless erosions of the privilege's protections" (citation omitted)).
26 *Id.* at 5.
27 *See* Order Granting in Part Def.'s Motion for Prot. Order, *Mix* (June 26, 2012), ECF No. 65 ("Protective Order").
28 *Id.* at 3 (citing *W.R. Grace*, 439 F. Supp. 2d at 1137).
29 *Id.* at 5.
30 *Id.*

(3) "the United States shall not use the EPI outside of its litigation with Mix. In particular, the United States is precluded from using the EPI in any investigation or litigation against [BP]."[31]

In a subsequent order, the court set forth a protocol for BP's delivery of, and the parties' access to, the EPI requested in Mix's subpoena.[32] The order called for BP to deliver into the court's custody a hard drive containing the subpoenaed materials, and further declared that "[a]ny party to this matter seeking access to the hard drive returned by BP . . . shall file a motion with the Court."[33] The court thereafter granted both Mix's and the government's motions to access the BP materials.[34] Trial is scheduled for June 10.[35]

II. Critique of the *W.R. Grace* Test

The *W.R. Grace* balancing test seems to offer a win–win solution to the dilemma courts face when an individual defendant seeks access to exculpatory evidence over his employer's or former employer's claim of attorney client privilege. When the trial court determines that privileged information, viewed in camera, is too exculpatory to constitutionally exclude, the court will admit the evidence, thereby reducing the likelihood of an incorrect conviction. At the same time, to protect the corporation's interest in the confidentiality of its privileged information, the court can issue an order expressly declaring that admission of privileged information does not trigger waiver of the corporation's privilege, and prohibiting the litigants from using the admitted EPI in future legal proceedings. A sensible solution, it would seem, but the test raises several concerns.

A. Supreme Court Case Law

To begin, the balancing nature of the test is arguably inconsistent with the Supreme Court's decision in *Swidler & Berlin v. United States*, where the Court reversed a holding by the D.C. Circuit that information covered by a decedent's attorney client privilege could be introduced into evidence when it would have "substantial importance to a particular criminal case."[36] Although *Swidler & Berlin* addressed the ability of a federal prosecutor to compel incriminating information subject to the privilege,[37] and thus is distinguishable from the case in which a criminal defendant asserts a Sixth Amendment right to introduce evidence showing his innocence,[38] the Court's underlying reasoning leaves less room to maneuver: according to the Court, "[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."[39]

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31 *Id.* at 5-6.
32 Order Addressing Protocol for BP EPI at 1, *Mix* (Feb. 28, 2013), ECF No. 207.
33 *Id.*
34 Order Granting Def.'s Motion for Access to BP EPI, *Mix* (Mar. 1, 2013), ECF No. 209; Order Granting United States' Motion for Access to BP EPI, *Mix* (Mar. 26, 2013), ECF No. 224.
35 Renotice of Trial, *Mix* (Jan. 24, 2013), ECF No. 185.
36 524 U.S. 399, 403 (1998).
37 *Id.* at 401-02.
38 *E.g.*, *Mix*, 2012 WL 2420016, at *3; *W.R. Grace*, 439 F. Supp. 2d at 1140-42.
39 524 U.S. at 409 (citing *Upjohn*, 449 U.S. at 393). Some litigants have made much of the fact that the government in *Swidler & Berlin* "concede[d] that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege," and that the Court said it did not need to reach that issue, "since such exceptional circumstances [were] not present [there]." *Id.* at 409 n.3. But it is the privilege-holder, not the government, whose concession would be legally significant, and, despite dicta about not needing to reach the issue, the Court's unequivocal rejection of *ex post* balancing seems to demonstrate its position.

Indeed, Justice O'Connor, writing in dissent to *Swidler & Berlin*, apparently construed the majority's reasoning to be unequivocal, stating at the outset of her opinion that "I do not agree with the Court that [the attorney client privilege] inevitably precludes disclosure of a deceased client's communications in criminal proceedings. In my view, a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality."[40]

Additionally, the *Swidler & Berlin* opinion casts further doubt on the *W.R. Grace* test in stating that "there is no case authority for the proposition that the privilege applies differently in criminal and civil cases . . . . [A] client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance."[41] Yet the *W.R. Grace* test, rooted firmly in the Sixth Amendment, gives the privilege lesser status in criminal proceedings.

B. The *W.R. Grace* Test in Practice

Its doctrinal vulnerabilities aside, the *W.R. Grace* balancing test, like any true compromise, leaves all sides less than satisfied.

From the perspective of individual officers and employees, the *W.R. Grace* test provides only limited relief. Although the test is an improvement over an absolute bar to introducing privileged information, it nonetheless requires individual defendants to seek admission of exculpatory evidence on a case-by-case basis, with virtually no way of predicting how the trial court will exercise its broad discretion under the test. Additionally, because the *W.R. Grace* procedure provides no mechanism for pre-indictment disclosure, it offers little comfort to individuals for whom indictment alone will cause irreparable harm. Similarly, and perhaps even more concerning, the test provides no relief whatsoever to civil defendants, even though civil enforcement actions can often result in serious monetary and other penalties. The Securities Exchange Commission, for instance, in addition to imposing stiff penalties and fines, can suspend or disqualify participants from the securities industry through purely civil proceedings.[42] Thus, subject to broad judicial discretion, available only at trial, and confined entirely to criminal proceedings, the *W.R. Grace* test leaves a substantial gap in protection for individual officers and employees.

From the perspective of the government and the public, it could be argued that the one-sided nature of the test will impair the factual integrity of trial. Notably, by virtue of the test's formulation, which permits a court to admit evidence that is "of such probative and exculpatory value as to compel admission,"[43] the test essentially creates a one-way street – whereas a defendant may prevail upon the court to admit evidence that exonerates, incriminating privileged information would apparently never come in. Similarly, because the *W.R. Grace* test provides defendants – but not prosecutors – the ability to discover privileged information, criminal defendants can presumably draft their Rule 17 subpoenas to target carefully any exculpatory privileged evidence in the corporation's possession, while excluding privileged evidence that tends to incriminate. Ironically, with the rules tilted in

40 *Id.* at 411 (O'Connor, J., dissenting, joined by Scalia, Thomas, JJ.).
41 *Id.* at 408-09.
42 *See, e.g.*, *Markowski v. SEC*, 34 F.3d 99, 101 (2d Cir. 1994).
43 *W.R. Grace*, 439 F. Supp. 2d at 1142.

this way, a culpable defendant may, in some circumstances, be better off if the corporation asserts privilege, because the defendant might then be able to selectively reveal only exculpatory privileged information.[44]

From the corporation's perspective, the test may pose much greater risk than the courts applying *W.R. Grace* have suggested. Although courts applying *W.R. Grace* impose strict protective orders over any privileged information produced, and reassure the corporation that privileged evidence will be admitted at trial only in "limited circumstances,"[45] it is unclear what real comfort those measures provide, when, as illustrated in *Mix*, the court nonetheless grants the prosecution unrestricted access to an entire hard drive of the corporation's privileged information.[46] While the *Mix* court ordered broadly that the United States "shall not use the EPI outside of its litigation with Mix," and provided expressly that the United States "is precluded from using the EPI in any investigation or litigation against the privilegeholder,"[47] these stipulations are susceptible to limiting interpretation. For instance, if the term "use" is construed consistently with how that term was used in Mix's original motion for protective order (i.e., "*use at trial*"),[48] it might apply only to the formal introduction of evidence in legal proceedings, while leaving the government free to conduct additional factfinding based on the privileged documents, or, depending on their content, to argue that the documents are not privileged at all.[49] Further, though arguably a technical point, the order binds only "the United States,"[50] inviting the question whether the order would be binding on other litigants who may obtain the information, either inadvertently during transfer or when it is introduced at trial.[51] Thus, while a corporation that is ordered to produce privileged documents under *W.R. Grace* surely welcomes some protective orders over none, protective orders like those issued in *United States v. Mix* expose the corporation to more risk than first meets the eye.

III. Modest Improvement to *W.R. Grace*

It is no secret that *W.R. Grace* represents a compromise, and, as such, it cannot be expected to fully satisfy all sides. For individual defendants to be able to introduce exculpatory information over a corporation's claim of attorney client privilege, the corporation must be compelled against its will to produce privileged information. That much is unavoidable.

But while some degree of compromise may be necessary, there is room for refinements to *W.R. Grace* that mitigate the concerns outlined above, without sacrificing the underlying goal of allowing individual criminal defendants to mount a full defense.

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44 Ordinarily, where the privilege rests with the defendant and not a third party, this kind of strategic disclosure would be foreclosed – the privilege cannot be "both sword and shield," so the maxim goes, *see, e.g.*, *In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (2d Cir. 2007) – but courts applying *W.R. Grace* have not invoked this language, *see, e.g.*, Protective Order, *supra* note 27, and for good reason, as it would be the shield-bearing corporation, not the sword-wielding defendant, that would be exposed.

45 *W.R. Grace*, 439 F. Supp. 2d at 1143.

46 Order Granting United States' Motion for Access to BP EPI, *Mix* (Mar. 26, 2013), ECF No. 224.

47 Protective Order, *supra* note 27, at 6.

48 Memo. in Support of Def.'s Motion for Prot. Order at 1, *Mix* (May 14, 2012), ECF No. 26-1.

49 One ground on which the prosecutor might challenge the corporation's claim of privilege is the crime-fraud exception. *See United States v. Zolin*, 491 U.S. 554, 563 (1989). Hypothetically, the prosecution could review the privileged documents to develop evidence that the corporation's communications to counsel were in furtherance of a crime or fraud. If this were successful, the documents would arguably no longer be subject to a protective order like the one in *Mix*, which by its terms applies only to "exculpatory *privileged* information." Protective Order, *supra* note 27, at 6 (emphasis added).

50 Protective Order, *supra* note 27, at 6.

51 In a similar vein, because the court's order explicitly precludes the government from using exculpatory privileged information "against the privilege-holder," Protective Order, *supra* note 27, at 6, it is susceptible to the negative inference that the government may be able to use the information against other officers or employees of the corporation, whether as the basis for additional fact-finding, in grand jury proceedings, or otherwise.

The protective orders accompanying a disclosure order under *W.R. Grace* should be more tightly drawn than those in *United States v. Mix*. At a minimum, courts ordering production under *W.R. Grace* should expressly preclude the prosecution from using the documents as the basis for additional fact-finding, or as the basis for challenging the privileged status of the documents after viewing their contents. To give meaningful effect to these prohibitions, the court should order the prosecution to erect a wall around the prosecutorial team who obtains access to the corporate privileged information, as is commonly undertaken by prosecutors who receive immunized testimony in other settings.[52]

Notably, although this modification by no means resolves the fundamental compromise that *W.R. Grace* represents, it could be implemented without impairing the Sixth Amendment interests that animate the test.

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The conflict outlined in this paper does not lend itself to simple resolution. The Supreme Court has made clear that the power to assert or waive the corporate attorney client privilege "rests with the corporation's management and is normally exercised by its officers and directors."[53] Further bolstering that ruling, federal courts have held uniformly that a former officer or employee cannot waive the privilege on behalf of the corporation,[54] and that current officers and employees, because they are bound to "exercise the privilege in a manner consistent with their fiduciary dut[ies],"[55] may not exercise privilege in a purely self-exculpatory manner.[56] In short, the background rules governing a corporation's claim of privilege are fairly airtight.

Ultimately, at least in the criminal setting, the balancing approach in *W.R. Grace* may represent the best among imperfect solutions, provided that future courts tailor their protective orders to better safeguard against misuse of corporate privileged information. As to civil proceedings, however, given the consensus around the inviolability of the corporate attorney client privilege,[57] a solution favoring individuals would appear to require a legislative fix.

52 *See* Karen Reynolds & Mandie Landry, *Procedural Issues*, 41 AM. CRIM. L. REV. 973, 990 n.116 (2004) (collecting cases).
53 *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985).
54 *See, e.g.*, *W.R. Grace*, 439 F. Supp. 2d at 1143 ("It is the company's current managers, not displaced managers, who have control over the assertion of the privilege. This is the case regardless of whether the communication at issue occurred during the tenure of previous management." (citing *Weintraub*, 471 U.S. at 349)); *Criswell v. City of O'Fallon, Mo.*, No. 06-cv-1565, 2008 WL 250199, at *3 (E.D. Mo. Jan. 29, 2008) ("Plaintiff is no longer a City employee, and is not in a position to waive the privilege on its behalf.").
55 *Weintraub*, 471 U.S. at 34849.
56 *See, e.g.*, *Pensacola Firefighters' Relief and Pension Fund Bd. of Dirs. v. Merrill Lynch, Fenner & Smith, Inc.*, No. 09-cv-53, 2010 WL 4683935, at *5-6 (N.D. Fla. Nov. 10, 2010) (holding corporate privilege not waived where officer's disclosure was "more of an effort to exculpate himself personally . . . than an effort by the company to disclose selective confidential statements that would benefit the company in litigation"); *In re Fedex Ground Package Sys., Inc.*, No. 05-MD-527, 2007 WL 1109115, at *4-5 (N.D. Ill. Apr. 10, 2007) (same); *see also In re Grand Jury Proceedings*, 219 F.3d 175, 188 (2d Cir. 2000) ("[T]he [waiver] issue [turns on] . . . whether [the statement] was a deliberate attempt on the part of the corporation to exculpate itself, as opposed to [the] [w]itness's effort to exculpate himself personally.").
57 *See generally* American Bar Association, Report of the Presidential Task Force on Attorney Client Privilege (2006), *available at* http://apps.americanbar.org/buslaw/attorneyclient/materials/hod/emprights_ report_adopted.pdf.