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Testify

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December 11, 2006

Via Email: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judicial Building
Washington, D.C. 20544

Re: NYC Hearings: Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

I hereby request time to testify at the hearings to be held in New York City on January 29, 2007 regarding proposed Federal Rule of Evidence 502.

Respectfully submitted,

Paul J. Neale
Executive Vice President

PJN:dv

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Testimony

December 19, 2006

Via Email: Rules_Comments@ao.uscourts.gov

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, DC 20544

Dear Mr. McCabe:

On behalf of DOAR Litigation Consulting, I appreciate the opportunity to testify at the Evidence Rule Committee hearing on January 29, 2007 in New York, NY. The following provides an overview of the testimony I intend to give at the hearing.

By way of background, DOAR Litigation Consulting is a consulting firm that advises companies and their counsel on assessing and mitigating litigation risk and on the best practices associated with building a cost-effective, defensible discovery plan in response to regulatory action, civil litigation and criminal actions using proven methodologies and advanced technological solutions. I am a testifying expert in federal court on the issues of the proper preservation, collection, management and production of information with a specific emphasis on electronically stored information.

I fully support the Committee's efforts relating to Proposed Rule 502 and recognize the importance of amending the rules to address the issues outlined therein. As a consultant who has advised companies and their lawyers on the best practices for managing enormous document collections in regulatory, civil and criminal actions, I have experienced first-hand the inherent risks in dealing with the production of electronically stored information. The time, effort and costs associated with a privilege review typically far outweigh the probative value of the document production itself. Furthermore, given the shear volume of information that needs to be addressed and the methods for doing so, the inadvertent production of privileged material and the potential waiver of privilege are virtually inevitable. The result has been protracted legal wrangling over what constitutes a waiver between/among ever more sophisticated litigants focusing on the methodology to determine privilege and how information was produced.

I feel strongly that the Committee needs to provide a provision on selective waiver that includes privilege protection at the state and federal levels. In my experience consulting parties involved in civil class actions following regulatory inquiries such as those involving the investment banking, mutual fund and insurance industries, the production of privileged documents which were initially produced to the regulator is almost always a key discovery issue addressed by lawyers for the plaintiff class. Oftentimes, the nature of the regulatory inquiry or the time demands associated with the response do not allow for a substantive privilege review. Furthermore, it is not uncommon for regulators to enter into agreements with producing parties regarding privileged documents which are then by default challenged by the plaintiffs' lawyers.

In my opinion, the Committee should also clarify "reasonable precautions to prevent disclosure" of privileged material by addressing the use of advanced analytical software applications and related methodologies to assist in the determination of privilege and to facilitate a more efficient production of relevant documents. Given the Committee's primary goal of reducing the time, effort and costs associated with the traditional document-by-document privilege screening process, the use of technology to address these issues which were, in fact, created by technological advances should be specifically considered. While studies show that the use of data analytical software applications are proven to be more accurate than traditional review methods, it is however likely that the use of these tools in lieu of traditional methods, will in some instances result in the inadvertent production of privileged material. Given the increasing use of these applications even in their relative infancy and the inevitable wide-scale use of them in the future, the Committee should specifically include their use and litigants' reliance on them as reasonable precautions.

I appreciate the Committee's consideration of my suggestions and look forward to testifying on January 29th.

Very truly yours,

Paul J. Neale
Executive Vice President

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