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Via Email to [Rules\\_Comments@ao.uscourts.gov](mailto:Rules_Comments@ao.uscourts.gov)

The Honorable Peter G. McCabe  
Secretary of the Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, D.C. 20544

***Re: Proposed Federal Rule of Evidence 502***

Dear Mr. McCabe:

I respectfully submit these comments on proposed Rule 502 of the Federal Rules of Evidence and would appreciate your sharing this letter with the rest of the Advisory Committee on Evidence Rules for its deliberations. Having had direct professional experience in compliance, records management, litigation management, legal technology applications, and business process development, I am familiar with the practical implications of proposed Rule 502 and trust the Advisory Committee will find my observations helpful in the rulemaking process.<sup>1</sup>

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<sup>1</sup>I was head of global compliance at Cendant Corporation until the company's disaggregation in 2006. During my decade of service in a public corporation, I developed and oversaw enterprise compliance, litigation and records management systems. Previously, I was in private practice, concentrating on corporate litigation, commercial law, and appellate practice and procedure. I am immediate-past president of the Association of Corporate Counsel, Greater New York Chapter. I chair the corporate counsel committee of the ABA Administrative Law and Regulatory Practice Section and am the Section's liaison to the ABA Presidential Task Force on Attorney-Client Privilege. I am a member of The American Law Institute. In 2006, I founded the business advisory firm, Lexakos LLC and the law practice, Wolf Associates LLC. The views expressed in this letter should be attributed only to me.

Like other members of the bar who have come before you to testify and comment on proposed Rule 502, I support and applaud the effort to establish standards for protecting attorney-client privilege and attorney work product. In this letter, I address three of the exceptions to waiver by disclosure contemplated by the proposed rule: (1) inadvertent disclosure, (2) “claw-back” and “quick-peek” agreements, and (3) selective waiver.

### **I. Inadvertent Disclosure Exception**

I support the adoption of a uniform inadvertent disclosure exception, which is an amendment necessary to harmonize the procedural changes in amended Rule 26 of the Federal Rules of Civil Procedure. The Advisory Committee observed in its notice of rulemaking that the new rule should “reduce the risk of forfeiting the attorney-client privilege or work-product protection so that parties need not scrutinize production of documents to the same extent as they now do.” While it is laudable to fashion a rule to protect against waiver for inadvertent disclosure, there are practical difficulties with applying such an exception using the current text of the proposed Rule 502(b).

#### **A. Corporate Governance Challenge: To Bring Order from the E-Chaos**

Studies estimate that organizations worldwide had sent or received over 60 billion emails each day in 2006, more than tripling the figure estimated for 2002. Organizations are struggling with information lifecycle management (“ILM”) and most people keep data well past its useful life. The business doctrine of ILM relies on enterprise content management (“ECM”) technologies and posits that to compete globally organizations must leverage and share knowledge through the use of

searchable, central repositories of business-critical information. ECM is the model to which all organizations should aspire, but a confluence of circumstances leads to retention of multiple instances of the same “electronically stored information.” We over-retain out of fear we will not find *that* email attachment when we need it.

Notwithstanding the self-evident benefits of ECM, few companies have been able to utilize that practice. Instead, most organizations struggle to manage and control so-called ESI due to fundamental issues of corporate governance and compliance. As Table 1 in the Appendix shows, there was no consistent oversight structure for the records management area at the beginning of this ongoing period of information explosion. Without an executive function managing this area, ECM has not become standard operating procedure.

Deploying scalable ECM technologies is highly complex and expensive, and success largely depends on a willingness to carry out business process analysis and re-engineer work flow (*i.e.*, examining how one manages information today and changing processes to capitalize on new technologies). In contrast to ECM and centralization, over the last five years, information technology departments have been storage and infrastructure focused, as IT fulfilled requests to add more email servers and bandwidth for more expansive global telecommunications. These infrastructures grew with little guidance from law departments and mostly without policies governing content management.<sup>2</sup>

When the law department started to ask IT managers to retain email for discovery in the 1990s, companies used email server backup tapes intended disaster

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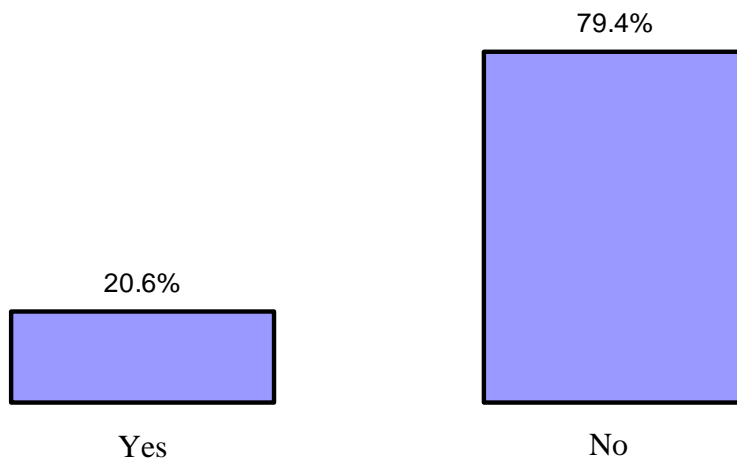
<sup>2</sup> [The Brave New World of e-Discovery Rules](#), *Compliance Week Magazine* (Special Edition Jan. 2007).

recovery as archives for litigation. Many hundreds of thousands of those backup tapes with email dating back as far as ten years still exist, and the content of those archives continue to surface in damaging ways. Extracting email from backup tape requires forensic skill and careful restoration, an expensive and risky undertaking. To make matters worse, organizations accumulated these backup tape inventories with permissive controls. Faced with the amended procedures for e-discovery in federal civil litigation, companies have finally started to bring order to the chaos of these sprawling IT infrastructures, but even the most basic request for ESI remains very expensive. It is difficult to reduce these backup tape inventories. Possession of the tapes makes the data is discoverable in new litigation, and retention is seemingly perpetual.

Companies need to start imposing better policy and procedures. Developing an effective records management program for a moderate-sized organization takes between eighteen months to three years. To compound the challenge, email volume continues to grow unabated and lawyers have difficulty influencing the use of technology in a corporation. The two functions that must coordinate closely to manage electronically stored information -- the law department and IT department -- do not report into the same person in most companies and do not coordinate their activity. While the law department struggles to identify an individual to champion records management, make the business case for capital investment and align management behind a program that needs everyone's support to succeed, there remains a gaping hole in records management compliance. As questions of governance and accountability remain, few companies are ready to enforce a legal preservation policy or purge ESI that has no ongoing business or legal purpose.

*B. Complications with Culling Privileged Information Delivered in Email*

Business people today expect to their legal advice from in-house counsel to come in email for all the reasons that medium has become the principal form of communication for business in general – email is efficient, expedient and global. Even so, only a fraction of the email generated and received contains privileged communications or attorney work product. If one accepts the premise that we receive and retain too much email, it follows that comingling privileged email with non-essential email makes it problematical to cull privileged email from everything else. In a recent poll taken in January 2007 during a webcast for Compliance Week, we asked in-house legal and compliance executives whether their company takes any measure to segregate privileged communications from general e-mail traffic as a standard operating procedure (i.e. before litigation)? Table 2 shows the results.<sup>3</sup>



Organizations can segregate privileged communications and attorney-work product from general email traffic and the other unstructured ESI stored on IT

<sup>3</sup> The poll took was conducted during a webcast on “[New Federal Rules of Civil Procedure – E-Discovery and Records Management](#), *Compliance Week* (Jan. 11, 2007).

systems. This can be achieved with an approach combining (1) business process analysis and re-engineering, (2) uniform guidelines for litigation management, and (3) matter management technology that uses an extranet. Extranet systems allow outside counsel to collaborate with inside clients and lawyers through a secure and restricted internet connection. Such a process and system naturally separates privileged communications and work product information from everything else. If litigation ensues and the organization must produce relevant emails, some of that data might contain privileged communications, but most everything dealing with legal issues, litigation or an internal investigation relating to the problem, would be stored in a *structured* matter management database system.

C. *Emerging Search Technologies are Replacing Traditional Attorney Review*

When dealing with terabytes of data, it is not cost effective or practical to search manually for relevant or privileged information with traditional methods. Corporations are turning to emerging review technologies with term- and concept-search capabilities, which isolate relevant information and reduce amount of data subject to attorney review. The analysis required for determining privilege is often more subtle than searching metadata for in-house attorney names or subject-lines labeled “attorney-client privilege.” At some level technology cannot replace manual, attorney review. Whether these new review technologies will withstand scrutiny under Federal Evidence Rules 702 and become reliable methodologies that satisfy *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), remains to be seen. These new technologies will remain an integral part of the process and play an important role in the analysis under proposed Rule 502(b).

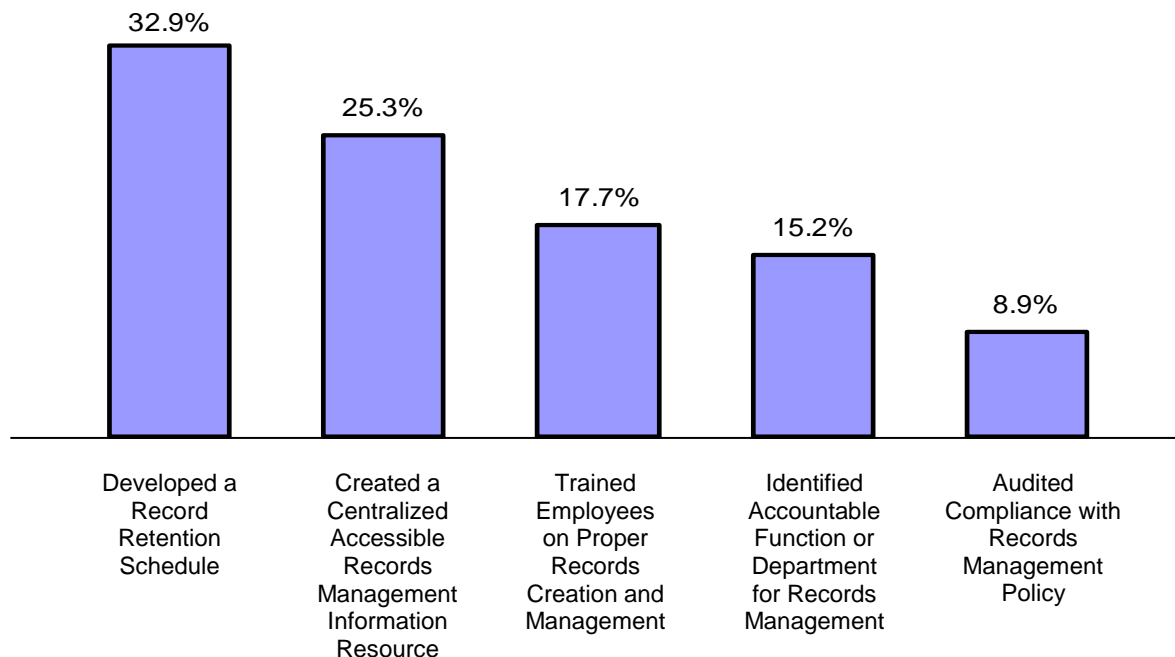
*D. Records Management Policy Compliance*

We would like to believe that what is needed for handling ESI is no more than extending records management policies used for managing paper documents. The preservation and disposition principles that apply to the content of paper records are no different from that which applies to the content of electronically stored information. It is simply a different medium. Exposure to spoliation claims and motions for sanctions under the amended Federal Rules of Civil Procedure have brought unprecedented attention to the need for records management compliance programs. Studies show companies are just starting to appreciate the need for effective records management compliance.

The General Counsel Roundtable conducted a survey of chief legal officers in late 2006, and the results show that few have effective records management. Eighty-five percent ranked records management as important or very important, and eighty percent ranked “Improving companywide records management policies, tools, and compliance” as important or very important. Eighty percent ranked “Improving electronic discovery policies and preparedness” as important or very important. Seventy-five percent ranked “Improving employee awareness of appropriate email use and tone” as important or very important. “Improv[ing] consistency of enterprise-wide compliance with records management policies” is the second highest priority for general counsel in 2007, behind “Revising and streamlining preferred provider network of external law firms.”

Surveys of the Association of Corporate Counsel corroborate these figures. In 2006, seven percent of chief legal officers said their company was prepared for the new Federal Rules of Civil Procedure and ninety-two percent were taking steps to

improve their litigation readiness. Chief legal officers said improving records management was among the most important tasks to address in 2007. With these ACC polls in mind, during the Compliance Week webcast we asked legal and compliance executives what steps they have taken to create a records management program. Table 3 shows the results of that poll.



Although law departments know the importance of having an effective records management policy, and perhaps view unrestricted email traffic as “clear and present danger” to the enterprise, a combination of competing priorities, flawed governance, and poor execution keeps efforts to improve records management compliance on the backburner.

*E. Difficulties Applying Rule 502(b) in Practice*

When you consider, then, the task of culling privileged communications from among all the other email in an organization, it begs the question of what is

necessary to satisfy the standard of reasonableness in the proposed new rule. The current draft of Rule 502(b) says a disclosure is inadvertent “if the holder \* \* \* *took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error. . . .*” (Emphasis added). If only a fraction of many millions emails have privilege content that needs protection, and most companies lack enforceable records management policies or practice ECM, it is unclear what “reasonable precautions” organizations might take to “prevent disclosure” or how one might take “reasonably prompt measures ... to rectify errors.” It is respectfully submitted that the standard is too high for most corporations to meet in time for a pre-production document review.

As noted, instituting the reforms needed to have effective records management in a large enterprise is a long-term proposition, which means few are or will be prepared to meet the threshold of inadvertency contemplated by the new proposed Rule 502(b). The rule should apply a test of reasonableness based on subjective good faith and courts should consider “whether an organization is taking steps necessary to have an effective records management compliance program.” Hence, the judgment of what is reasonable should take into account the totality of circumstances, including time, place and context. In other words, the analysis should include consideration of the size of the production, the amount of time needed to produce, and the care with which the organization handles information before litigation giving rise to the obligation to produce.

When there is a large production of ESI needed in a matter, there is little a producing party can do to prevent disclosing privileged communications. There should be some forgiveness, however, if the organization mitigates the risk of

inadvertent disclosure through an effective records management program with rules that govern the creation, use, retention, and ultimate disposal of ESI. Such a program would need a (1) high-level executive in place with authority over (2) the enforcement of records management policies with procedures, and that executive must have (3) adequate resources for (4) employee training and awareness programs, and (4) regular monitoring (5) to remediate gaps or deficiencies. Though an inadvertent disclosure exception to waiver is certainly desirable, there is much to address before corporations would be able to meet the high standard of reasonableness contemplated by from Rule 502(b).

Based on the forgoing recommendations, I respectfully suggest the Advisory Committee consider revising the proposed rule as follows:

**(b) Inadvertent disclosure.** — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions, *technological or otherwise through effective records management compliance practices*, to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

## **II. Claw-back Agreements and Confidentiality Orders**

For the reasons discussed above, traditional attorney review is not a cost-effective, efficient or accurate method for culling privileged information from otherwise relevant ESI. Proposed Rule 502 encourages the use of “claw-back” or “sneak-peek” agreements, supported by confidentiality orders under the proposed rule, to facilitate discovery and “limit the costs of privilege review.” Such stipulations and confidentiality orders allow parties to avoid the expense of pre-

production review and recover privileged information inadvertently produced without fear of waiver. Aside from the question of enforceability as to non-parties, it is unclear how parties will realize savings by using these procedures. The parties would be required to conduct the same review and presumably incur the same costs, but later in time. Although the claw-back agreement might achieve the goal of expediency, the parties invariably will incur the expense of culling for privileged communications.

There are practical risks associated with the use of stipulated agreements to produce potentially privileged material under the ambit of a protective order. Even if the parties agree that information shared through this procedure would remain privileged and not discoverable in the proceedings in which such an order is entered, once privileged information is produced, particularly in electronic form, it is very difficult to contain dissemination or reproduction and the producing party runs a significant risk of finding privileged communications republished notwithstanding stipulated confidentiality orders. While it is worthwhile to use claw-back and sneak-peek agreements in appropriate circumstances, these methods have limitations and certainly are not a substitute for good records management compliance.

### **III. Selective Waiver**

Any rule that would lead to the erosion of the attorney-client privilege will be met with strenuous opposition. There surely has been vocal opposition to proposed Rule 502(c) and much debate about the ethics and legality of prosecutors asking an organization to waive privileges as a show of cooperation and to gain favor. I agree

coercive tactics that lead to the disclosure of privileged material violate fundamental rights and emasculate the basic principles underlying the attorney-client privilege.

Should intellectual honesty prevail, most would agree there *are* circumstances where organizations *choose* to share the fruits of an investigation to expedite proceedings and control collateral damage in the interests of capital markets and shareholder value. Indeed, each fiscal quarter public company lawyers share privileged information and work product with auditors when analyzing probable and estimable litigation exposure to ensure the proper setting of reserves pursuant to Statement of Financial Accounting Standard No. 5.<sup>4</sup> Seemingly any situation involving a meaningful internal investigation would require corporate counsel to share some privileged findings with auditors and independent directors. Outside auditors and directors share a common interest to protect the organization and need information to assess situations and discharge oversight duties. Arguably, there would never be a circumstance where a company would voluntarily share privileged information with prosecutors and not its auditors and board of directors. If anything, in the interest of self-governance and corporate responsibility, organizations should be able to disclose privileged information to auditors or outside directors when necessary to determine the need for self-reporting or other action, without fear of suffering broad, subject-matter waiver as to third parties.

Most who oppose proposed Rule 502(c) argue that the rule, if adopted, would encourage more requests for waivers and abuses by the government. A rule for

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<sup>4</sup> Statement of Financial Accounting Standards No. 5 requires that certain conditions exist before determining loss contingencies representing liabilities or asset impairments, and the reserve amount to accrue. The loss must be probable as of the balance sheet date and reasonably estimable; significantly, the loss must have occurred prior to the creation of the loss contingency and must not be in the future.

selective waiver or “limited disclosure” in this context does have potential to invite governmental abuses and waiver requests as a matter of investigative convenience. But if the legal system does not reward prosecutorial overreaching, those abuses can be checked. The Federal Rules of Evidence do not treat a coerced disclosure as a waiver. Without voluntary waiver, the holder of the privilege should still enjoy all protections recognized by law and third parties should be subjected to an exclusionary rule precluding the use of wrongfully obtained information.

The corporate and private bar, and most every other association that has spoken publicly on the subject, argues that there has emerged a “culture of waiver” in the post-Enron years, where the government uses a target’s decision to waive privileges as a litmus test to show cooperation in an investigation and possibly gain favorable treatment as a result. I agree with this assessment, but only in part.

The pressure of the bar, and perhaps the bill introduced by Senator Specter at the end of the 109<sup>th</sup> Congress, and reintroduced at the start of the 110<sup>th</sup> Congress, ultimately led to the issuance of the “McNulty Memo” on December 12, 2006. The Specter bill, titled “The Attorney-Client Privilege Protection Act,” among other things, would prohibit the government from conditioning civil or criminal charge decisions on whether an organization asserts privileges, defends employees with common interests, or fails to terminate employees implicated in an investigation. The McNulty Memo put one of these elements to rest when it denounced the policy against organizations advancing defense costs for employees, in response to the recent landmark decision of Judge Kaplan in the KPMG tax litigation.

The McNulty Memo describes procedures prosecutors must follow before asking an organization to waive privilege, which varies based on the type of

information sought, and says the government will not condition waiver on determinations of whether an organization is being “cooperative.” As a practical matter, there is nothing to prevent the government from considering waiver as a factor in measuring an organization’s disposition, even if not expressly stated. The McNulty Memo probably does not go far enough and most oppose, flatly, any rule that might encourage more waiver requests in criminal or civil investigations.

I respectfully submit that a blanket opposition to proposed new Rule 502(c) is misplaced. Organizations have always wanted the type of protections envisioned under the proposed rule. Even assuming for sake of argument there have been more waiver requests than in the past, proposed Rule 502(c) would only improve the status quo and afford protections that do not exist today. Requests for limited disclosure should be the last resort, however, and the principal focus of prosecutors when considering whether to charge a corporation, initially, should be an assessment of organizational culture and effectiveness of compliance programs.

An organization should have the opportunity to demonstrate they have an ethical culture and an effective compliance program. The government and criminal defense bar have fixated on privilege waiver as a sole means to gauge or demonstrate cooperation, and the over-reliance on waiver in this context is troubling. Companies have spent and are spending millions of dollars each year maintaining and improving ethics and compliance programs modeled after the principles espoused in the Federal Sentencing Guidelines, the Thompson Memo and the Seaboard Report. An appreciation for organizational efforts to self-govern and improve corporate culture are strikingly absent from the analysis with prosecutors. How to measure the effectiveness of an ethics and compliance program is an

admittedly difficult undertaking, but there should be meaningful opportunities to demonstrate the strength of compliance programs. If prosecutors and the defense bar better understood these developments and had objective means to recognize a good culture from a corrupt one, the emphasis on privilege waiver as a *de facto* litmus test for cooperation would dissipate and proposed Rule 502(c) might be viewed in a different light.

There are few, if any, compliance officers involved in the conversations where defense lawyers and prosecutors discuss a pending internal investigation or contemplated action. In my view, the dynamic of those discussions would change if the person with day-to-day responsibility for the organization's ethics and compliance were present. If able to demonstrate the effectiveness of a compliance program on the culture of an organization, there might be a higher degree of trust in the reliability of the nature and extent of a corporation's investigative efforts and scope of self-reporting, and waiver of privileges would be necessary, perhaps, as a last resort.

In considering the proposed Rule 502(c), therefore, I respectfully suggest that the Advisory Committee take into account the prospect for prosecutorial abuses and coerced waivers by adding the word "proper" before the phrase "exercise of its, regulatory, investigative, or enforcement authority...." I further recommend the Advisory Committee consider addressing in its comments to the proposed rule the importance of considering the totality of circumstances, including the effectiveness of an ethics and compliance program, before prosecutors or regulators resort to extreme measures such as requesting the disclosure of attorney-client communications or attorney work product.

Based on these comments, it is respectfully submitted that Rule 502(c) should include the additional exception and be revised as follows:

**(c) Selective waiver.** *(1)* In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the *proper* exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.

*(2) A public corporation's disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to an outside auditor or director of the company in the exercise of their regulatory, investigative, or oversight authority—does not operate as a waiver of the privilege or protection in favor of other persons or entities, including government entities.*

Thank you for the opportunity to submit these comments and share my views on the important issues raised by proposed new Rule 502 of the Federal Rules of Evidence.

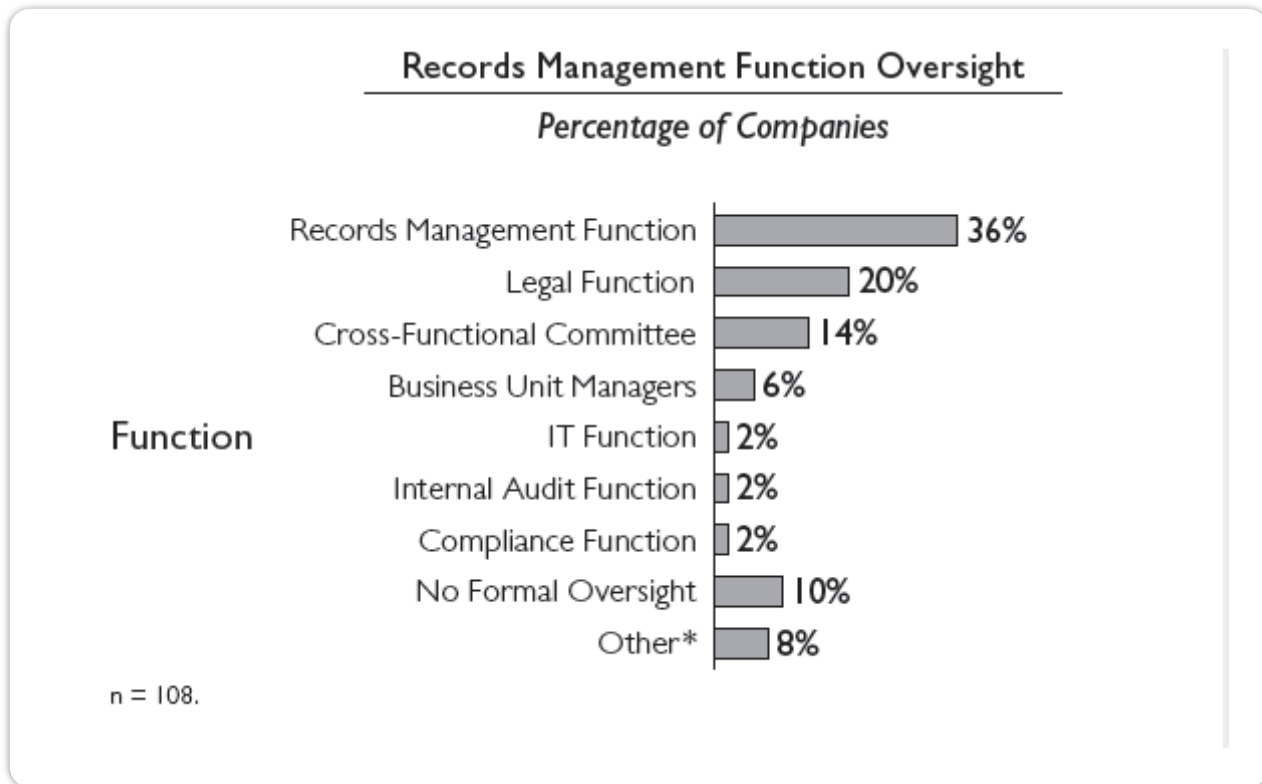
Respectfully submitted

Richard J. Wolf



## APPENDIX

Table 1<sup>5</sup>



<sup>5</sup> Provided with express permission of the General Counsel Roundtable 2003.