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December 29, 2004

04-CV-065  
Request to Testify  
1/28 Dallas

**VIA FACSIMILE AND  
FIRST CLASS MAIL**

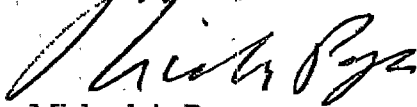
Peter G. McCabe, Esq.  
Secretary  
Administrative Office of the U.S. Courts  
One Columbus Circle, N.E.  
Washington, D.C. 20544

Re: Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
Civil Rules - January 28, 2005 E-Discovery Hearing, Dallas, Texas

Dear Mr. McCabe:

I wish to testify before the Judicial Conference Advisory Committee's hearing on Civil Rules on January 28, 2005 in Dallas, Texas. As past president of the Seventh Circuit Bar Association, the International Association of Defense Counsel and Lawyers for Civil Justice, I believe I have the broad experience and national perspective which would be of interest to the Committee. Please advise if there is anything further you need in connection with this request to testify.

Sincerely yours,



Michael A. Pope

MAP:kb

cc: Alfred W. Cortese, Jr., Esq.  
Barry Bauman, Esq.

CHI99 4410596-1.009900.0021



04-CV-065  
Testimony 1/28 Dallas

**REMARKS BY MICHAEL A. POPE ON PROPOSED AMENDMENTS  
TO FEDERAL RULES OF CIVIL PROCEDURE**

**January 28, 2005  
Dallas, Texas**

I appreciate the opportunity to testify before the Advisory Committee in support of your proposed amendments to the Federal Rules of Civil Procedure. As a lawyer who has practiced for over thirty years in the area of complex litigation, I believe an important component of the civil justice system includes a clear understanding by the public and by the parties to the litigation regarding exactly how procedural rules will be applied in any case. These amendments are a major step forward in seeking clarification in the important area of electronic information and the responsibility of parties to litigation to preserve and produce such information.

Since I spend considerable time advising parties to litigation, I can assure you there is a great deal of confusion and concern, even among sophisticated clients, regarding the duty to preserve information prior to formal discovery. A review of the cases where sanctions have been assessed leaves even experienced observers with the conclusion that this is a particularly dangerous area, in effect a trap for the unwary. That kind of situation is always a problem for good lawyers; our clients rightly expect us to provide them with clear guidelines and direction, and we feel inadequate when we are unable to do so. But this area, I would suggest, is even worse, because today there simply are no good answers. So, having given these issues much thought, I would describe the current situation as a "trap for the wary."

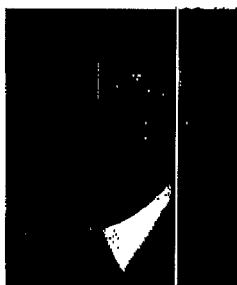
By bringing some clarification to this conflict, you serve a positive function and enhance the respect of lawyers and litigants for the federal courts and the civil justice system. I particularly commend you for two specific areas of the proposed rules, the two-tier approach to

discovery based on the availability of information, and the creation of a safe harbor, whereby parties who act reasonably in anticipation of discovery can avoid being later subject to sanctions.

The two-tier approach of focusing on and facilitating discovery of documents or electronic data which is "readily accessible" is a realistic recognition of how most businesses conduct themselves. Regardless of the complexity of a company's disaster recovery system for electronic data, the first focus of discovery ought to be on information which is available. In my experience, for all the concern expressed by lawyers and judges regarding the preservation of "back-up tapes" and other material which is difficult or expensive to locate, 99% of all information needed to prepare a case for trial is, in fact, readily accessible, as that concept is used in the proposed rule. Moreover, most "back-up tapes" are not easily searchable, and their preservation is very expensive while being relatively useless to the parties in litigation. Any reasonable cost benefit analysis would suggest that there is little reason to pursue that area for the legitimate discovery of information which is likely to become evidence in a case.

Similarly, while there have been suggestions for additional clarifications of the "safe harbor" provision in the proposed rules, in my opinion the concept is an important one. Parties to litigation and the general public need clear guidelines so that if they conduct themselves reasonably, they can be assured that they will not be subject to sanctions or other after-the-fact punishment. This is particularly important in the area of electronic data, because so many employees in most companies have the ability to generate corporate documents, and no CEO or general counsel, much less an outside counsel, can effectively control all their actions. Thus, absent an intentional or willful violation of a specific court order or negotiated agreement among the lawyers, reasonable steps to preserve information relating to the dispute ought to be all that is required. Civil litigation, particularly in Federal Court, should not resemble a game of "Gotcha!" particularly when the Gotcha is a serious allegation of spoliation of evidence.

# McDermott Will & Emery



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### Practice Areas & Industries

- Class Actions
- Environmental
- Insurance Coverage
- Litigation / Arbitration - Insurance Disputes
- Product Liability & Regulation
- Professional Liability
- Trial

### Education

- Northwestern University School of Law, J.D. *cum laude*, 1969
- Loyola University of Chicago, B.S., 1966

Michael A. Pope is a partner in the law firm of McDermott Will & Emery LLP based in the Firm's Chicago office. He heads the Firm's international Product Liability Practice Group.

Michael has a national practice in product liability matters, including large class action lawsuits. He regularly tries cases before juries around the country, and has organized national products programs for several client companies. A frequent lecturer on toxic torts and the trial of complex cases, he taught products liability at IIT/Chicago-Kent College of Law for five years. He is currently representing State Farm in class action litigation in Illinois, and various Blue Cross Blue Shield plans in the HMO class action MDL in Miami, Florida.

Michael also has extensive experience in handling reinsurance disputes, in the interpretation of excess and umbrella liability insurance policies, and in professional liability and complex business litigation.

Michael is the immediate past president of the Seventh Circuit Bar Association, the official liaison between practicing lawyers and the federal judges in Illinois, Indiana and Wisconsin. He is also a former chairman of the board of trustees of the National Judicial College in Reno, Nevada. He heads the Defense Research Institute's Task Force on Mass Torts, and is a past president of Lawyers for Civil Justice, a national coalition of corporations and trial lawyers interested in improvements in the civil justice system.

Michael has served as president of the International Association of Defense Counsel, the oldest professional association of trial lawyers practicing in the defense of civil litigation. He is a fellow of the American College of Trial Lawyers and serves on its special committee on the Administration of Justice. He is also a fellow of the International Society of Barristers and of the International Academy of Trial Lawyers. Since 1996, he has been a member of the American Law Institute. Michael is a member of the Chicago Bar Association (Board of Managers, 1987-1990), the Illinois State Bar Association (Chair, Special Committee on Discovery Reform, 1994-1995), the American Bar Association, the Defense Research Institute (Board of Directors, 1993-1995), and the Product Liability Advisory Council.