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ABOUT MEMBERS EVENTS & NEWS

DID YOU KNOW? Corporations VOTED to adopt this. Through ALEC, global companies work as “equals” in “unison” with politicians to write laws to govern your life. Big Business has “a VOICE and a VOTE,” according to newly exposed documents. **DO YOU?**

Model Rules Governing Discovery of Electronically Stored Information and Limitations on Waiver of Attorney-Client Privilege and Work Product

RULE 1. DEFINITIONS.

In these rules:

- (1) “Discovery” means the process of providing information in a civil proceeding in the courts of this state pursuant to [insert reference to state rules of civil procedure or these rules].
- (2) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.
- (3) “Electronically stored information” means information that is stored in an electronic medium and is retrievable in usable form.
- (4) “Attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications.
- (5) “Work-product protection” means the protection that applicable law provides for attorney work product.
- (6) “Party” means any person from whom discovery of electronically stored information is sought, whether or not that person is a party to the pending action.

RULE 2. DISCOVERY OF ELECTRONICALLY STORED INFORMATION.

- (a) A party need not provide discovery of electronically stored information from sources that are not reasonably accessible because of undue burden or cost.
- (b) On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is from a source that is not reasonably accessible because of undue burden or cost.
- (c) The court may for good cause order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or cost if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or cost, taking into account the amount in controversy, the importance of the issues, and the importance of the requested discovery in resolving the issues.
- (d) If the court orders discovery of information from a source that is not reasonably accessible, the order shall require the requesting party to pay the reasonable expenses required to retrieve and produce the information. The court also may specify other conditions for the discovery.
- (e) No duty to preserve information from sources that are not reasonably accessible arises absent agreement or the entry of an order in the action requiring such preservation after reasonable notice to the party from whom preservation is sought. An order may be entered only if the requesting party shows that the information sought is non-duplicative, directly relevant and material to the claims and defenses in the action and that the need for such information outweighs the burden of preserving it.
- (f) (1) The court shall set conditions on discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:
 - (A) it is possible to obtain the information from another source that is more convenient, less burdensome, or less expensive;
 - (B) the discovery sought is unreasonably cumulative or duplicative;
 - (C) the party seeking discovery has had sufficient opportunity by discovery in the action to obtain the information sought; or
 - (D) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the importance of the issues at stake in the action, and the importance of the requested discovery in resolving the issues.
- (2) Such conditions may include:
 - (A) limiting the frequency or extent of the discovery;
 - (B) requiring the discovery to be conducted in stages with progressive showings by the requesting party of a need for additional information;
 - (C) limiting the sources of electronically stored information to be accessed or searched;
 - (D) limiting the amount or type of electronically stored information to be produced;

(E) modifying the form in which the electronically stored information is to be produced; and

(F) allocating to the requesting party some or all of the cost of accessing, identifying, retrieving, formatting, and producing the electronically stored information.

RULE 3. SANCTIONS.

The court may not impose sanctions on a party for failure to provide electronically stored information lost as the result of the routine operation of an electronic information system unless the party intentionally or recklessly violated an agreement or order issued in the action requiring the preservation of specified information.

RULE 4. FORM OF PRODUCTION.

(a) A party requesting production of electronically stored information may specify the form in which each type of electronically stored information is to be produced.

(b) If a party responding to a request for production of electronically stored information objects to a specified form for producing the information, the responding party must state the form or forms it intends to use.

(c) Unless the parties otherwise agree or the court otherwise orders:

(1) If a request for production does not specify a form for producing electronically stored information the responding party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(2) a party need not produce the same electronically stored information in more than one form.

RULE 5. Claims of Attorney-Client Privilege and Work Product Protection

(a) If information produced in discovery is subject to a claim of privilege or of work product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, each receiving party must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(b) A waiver by disclosure of a communication or information covered by the attorney-client privilege or work product protection extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(c) A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error.

(d) Controlling Effect of Court Orders and Agreements:

(1) A court may order that the attorney-client privilege or work product protection is not waived by disclosure connected with the litigation pending before the court -- in which event the disclosure is also not a waiver in any other proceeding.

(2) Unless incorporated into a court order, an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement but not on other persons. If the agreement is incorporated into a court order, the order governs all persons or entities, whether or not they are or were parties.

*Adopted by the Civil Justice Task Force
May 2, 2009.*

*Approved by the American Legislative Exchange Council's Board of Directors
June 6, 2009.*

Did you know that Victor Schwartz--a lawyer who represents companies in product litigation--was the corporate co-chair in 2011?

About Us and ALEC EXPOSED. The Center for Media and Democracy reports on corporate spin and government propaganda. We are located in Madison, Wisconsin, and publish www.PRWatch.org, www.SourceWatch.org, and now www.ALECExposed.org. For more information contact: editor@prwatch.org or 608-260-9713.

Exposed

By the Center for
Media and Democracy
www.prwatch.org

Center for Media and Democracy's quick summary

This bill would help corporate defendants avoid liability in lawsuits. The "discovery" stage of a lawsuit requires that the defendant provide requested information, which can help the plaintiff to prove their case. This stage is particularly important when suing a corporate defendant, where the plaintiff will rarely have information about specific corporate practices that led to, for example, injury, a defective product, or discriminatory conduct. This bill allows a defendant to refuse to turn over electronically stored documents that are not "reasonably accessible" because of "undue burden or cost." This bill would work in favor of large corporate defendants who maintain equally large electronic information.

See also "Summary Judgment Procedure Act," which would give corporate defendants the ability to narrow the scope of potential issues before parties reach discovery; see also the "Accuracy in Pleading Act," limiting attorneys' ability to bring suit with limited factual support (and the expectation the information would be revealed during discovery).

ALEC EXPOSED

"ALEC" has long been a secretive collaboration between Big Business and "conservative" politicians. Behind closed doors, they ghostwrite "model" bills to be introduced in state capitols across the country. This agenda—underwritten by global corporations—includes major tax loopholes for big industries and the super rich, proposals to offshore U.S. jobs and gut minimum wage, and efforts to weaken public health, safety, and environmental protections. Although many of these bills have become law, until now, their origin has been largely unknown. With **ALEC EXPOSED**, the Center for Media and Democracy hopes more Americans will study the bills to understand the depth and breadth of how big corporations are changing the legal rules and undermining democracy across the nation.

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