

# AMERICAN LEGISLATIVE EXCHANGE COUNCIL

## MEMORANDUM

**To: Civil Justice Task Force Members**  
**From: Amy Kjose, Civil Justice Task Force Director**  
**Date: March 25, 2011**  
**Re: 35 DAY MAILING – Spring Task Force Summit: Civil Justice Task Force**

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The American Legislative Exchange Council will host its Spring Task Force Summit **April 28-29** at the **Hilton Cincinnati Netherland Plaza** in **Cincinnati, Ohio**. The deadline to register and get housing has been extended. **You have until April 6th to get a room at the conference rate and receive a \$50 discount on registration.** If you have not registered for the conference, you may do so at [www.alec.org](http://www.alec.org).

### About This 35-Day Mailing

This is an electronic-only 35-Day Mailing. In addition to receiving the 35-Day Mailing via e-mail, you may also access it on the Civil Justice Task Force's web page at [www.alec.org/civiljustice](http://www.alec.org/civiljustice). Keep in mind that you will need your ALEC username and password to access the 35-Day Mailing online. If you don't have an ALEC log-in, or if you'd like to change your username and password, contact Briana Mulder at 202-742-8507 or by email at [bmulder@alec.org](mailto:bmulder@alec.org). Conversely, if you choose to receive 35-Day Mailings "snail-mailed" to you, please let me know. We will assume that you prefer the 35-Day Mailing e-mailed to you unless you indicate otherwise.

### Meetings Civil Justice Task Force Members Should Attend:

- Civil Justice Task Force Luncheon, **12:30-1:30pm, Friday, April 29**
- Civil Justice Task Force Meeting, **2:00-5:00pm, Friday, April 29**

### Please find the following materials enclosed:

- STFS Tentative Agenda, Registration Materials, and Reimbursement Policy
- Working Agenda for the Civil Justice Task Force Luncheon
- Working Agenda for the Civil Justice Task Force Meeting
- ALEC Mission Statement & Task Force Operating Procedures
- Submitted Legislation:
  - *Resolution in Support of Fair Recourse and Effective Deterrence Against Frivolous Claims*
  - *The Phantom Damages Elimination Act*
- Civil Justice Task Force Roster

**Travel and Accommodations:** The conference hotel for STFS is the **Hilton Cincinnati Netherland Plaza** located at 35 West Fifth Street, Cincinnati, Ohio.

**For State Legislators:** ALEC will cover some expenses for Civil Justice Task Force public sector members. ALEC will provide 2 nights of accommodations in the host hotel. Up to \$350 in travel expenses will be reimbursed post conference. See the attached reimbursement policy for procedures. Alternates may attend the Task Force meetings with approval by the State Chair if any of the standing members from that state are unable to attend.

I look forward to seeing you in Washington. If you have any questions or comments regarding the meeting, please contact me at (202) 742-8510 or by e-mail at [akjose@alec.org](mailto:akjose@alec.org).

## **SCHOLARSHIP POLICY BY MEETING**

### ***ALEC Spring Task Force Summit:***

1. ***Spring Task Force Summit Reimbursement Form:*** ALEC Task Force Members are reimbursed by ALEC up to \$350.00 for travel expenses. Receipts must be forwarded to the ALEC Policy Coordinator and approved by the Director of Policy.
2. ALEC Task Force Members' room & tax fees for up to a two-night stay at the host hotel are covered by ALEC.
3. Registration fees are not covered; however, Task Force Members may submit registration expenses for payment from their state scholarship account upon approval of the State Chair.
4. *Official Alternate Task Force Members* (chosen by the State Chair and whose names are given to ALEC more than 35 days prior to the meeting to serve in place of a Task Force Member who cannot attend) are reimbursed in the same manner as Task Force Members.
5. ***State Scholarship Reimbursement Form:*** Any fees above the set limit, or expenses other than travel and room expenses can be submitted by Task Force Members for payment from their state scholarship account upon the approval of the State Chair. Receipts must be submitted to the State Chair, who will submit the signed form to the Director of Membership.
6. *Non-Task Force Members* can be reimbursed out of the state scholarship fund upon State Chair approval. Receipts must be submitted to the State Chair, who will submit the appropriate signed form to the Director of Membership.

### ***ALEC Annual Meeting:***

***State Scholarship Reimbursement Form:*** State scholarship funds are available for reimbursement by approval of your ALEC State Chair. Expenses are reimbursed after the conference, and may cover the cost of travel, room & tax, and registration. Receipts are to be submitted to the State Chair, who will then submit the signed form to the Director of Membership.

### ***ALEC States & Nation Policy Summit:***

1. ***States & Nation Policy Summit Reimbursement Form:*** ALEC offers two scholarships per state to cover the cost of travel, room & tax, and registration not to exceed \$1,000.00 per person for a total of \$2,000.00 per state. ALEC scholarship recipients must be named by the ALEC State Chair. Expenses are submitted to the State Chair and reimbursed after the conference. The State Chair submits the signed form to the Director of Membership.
2. ***State Scholarship Reimbursement Form:*** Any other fees or payments must come out of the state scholarship account, with the approval of the State Chair. Receipts must be submitted to the State Chair, who submits the signed form to the Director of Membership.

### ***ALEC Academies:***

***Academy Reimbursement Form:*** Attendees of ALEC Academies are reimbursed by the Task Force Committee hosting the Academy. Attendees will receive a form at the Academy, and will be reimbursed up to \$500.00 for travel, and room & tax fees for a two-night stay by ALEC. Receipts must be forwarded to the appropriate Task Force Director and approved by the Director of Policy.

# ATTENDEE REGISTRATION / HOUSING FORM

Hilton Cincinnati Netherland Plaza -  
Cincinnati, OH

Early Registration deadline is April 6, 2011  
Housing cut-off date is April 6, 2011

April 28-29, 2011



**Online** [www.alec.org](http://www.alec.org) **Fax (credit cards only)** 202.331.1344 **Phone / Questions** • Mon-Fri, 9am-5:30 pm Eastern  
Registration: 202.742.8538 / Housing: (800) 221-3531 **Mail** • ALEC Registration & Housing  
P.O. Box 96754 • Washington, DC 20090-6754

## ATTENDEE INFORMATION

Prefix (required) ☐ Sen ☐ Rep ☐ Del ☐ Mr ☐ Mrs ☐ Ms ☐ Other \_\_\_\_\_  
Last Name \_\_\_\_\_ First Name \_\_\_\_\_ Middle Initial \_\_\_\_\_ Badge Nickname \_\_\_\_\_  
Title \_\_\_\_\_  
Organization (required) \_\_\_\_\_  
Address \_\_\_\_\_ Suite # \_\_\_\_\_  
City \_\_\_\_\_ State/Province \_\_\_\_\_ Country \_\_\_\_\_ ZIP/Postal code \_\_\_\_\_  
Daytime phone \_\_\_\_\_ Fax \_\_\_\_\_ Alternate phone \_\_\_\_\_  
Email (confirmation will be sent by email) \_\_\_\_\_

Spouse / Guest: If registering a spouse or guest, please complete the spouse/guest registration form.

## REGISTRATION

**\*\*Save \$50 on registration by booking your hotel room in ALEC's headquarter hotel\*\***

**DISCOUNTED REGISTRATION FEES** are extended only to registrants booking ALEC's headquarter hotel.  
ALEC will reimburse \$50 when your accommodations are confirmed.

**Note: Member fees are subject to verification**

- ☐ I have already registered # \_\_\_\_\_  
☐ ALEC Legislative Task Force Member  
☐ ALEC Private Sector Task Force Voting Member  
☐ ALEC Legislative Member/ Non-Task Force Member  
☐ Private Sector Member/ Non-Task Force Member  
☐ Legislative/ Non-Member  
☐ Private Sector/ Non-Member  
☐ ALEC Non-Profit Member (501(c)(3) status required)  
☐ Non-Profit Non-Member (501(c)(3) status required)  
☐ Legislative Staff / Government  
☐ ALEC Legacy Member

	Early Until 04/06	On-Site Begin 04/07	Amount
<input type="checkbox"/> I have already registered # _____	\$ 150	\$ 150	\$ _____
<input type="checkbox"/> ALEC Legislative Task Force Member	\$ 250	\$ 250	\$ _____
<input type="checkbox"/> ALEC Private Sector Task Force Voting Member	\$ 400	\$ 500	\$ _____
<input type="checkbox"/> ALEC Legislative Member/ Non-Task Force Member	\$ 550	\$ 700	\$ _____
<input type="checkbox"/> Private Sector Member/ Non-Task Force Member	\$ 525	\$ 625	\$ _____
<input type="checkbox"/> Legislative/ Non-Member	\$ 875	\$ 1,025	\$ _____
<input type="checkbox"/> Private Sector/ Non-Member	\$ 475	\$ 575	\$ _____
<input type="checkbox"/> ALEC Non-Profit Member (501(c)(3) status required)	\$ 625	\$ 725	\$ _____
<input type="checkbox"/> Non-Profit Non-Member (501(c)(3) status required)	\$ 400	\$ 500	\$ _____
<input type="checkbox"/> Legislative Staff / Government	\$ 0	\$ 0	\$ _____
<input type="checkbox"/> ALEC Legacy Member			

Promo Code \_\_\_\_\_

**TOTAL REGISTRATION FEES:** \$ \_\_\_\_\_

**Note:** Registration forms with enclosed payments must be postmarked by April 6, 2011, to be eligible for early registration rates. Forms and/or payments received after April 6, 2011, will be subject to the on-site registration rate. If registering after April 6, 2011, please bring completed form and payment to register on-site.

## REGISTRATION CONFIRMATION INFORMATION

Online registrants will receive immediate email confirmation. If registering by form, confirmation will be emailed, faxed, or mailed within 72 hours of receipt of payment.

## REGISTRATION CANCELLATION / REFUND INFORMATION

Registrations cancelled prior to 5pm Eastern April 6, 2011 are subject to a \$100 cancellation fee. Registrations are non-refundable after 5pm Eastern April 6, 2011.

## HOUSING

## RESERVATION CUTOFF FOR ALEC DISCOUNTED RATE IS April 6, 2011

**\*\*Save \$50 on registration by booking your hotel room in ALEC's headquarter hotel\*\***

- ☐ I do not require a reservation at this time.

Arrival Date \_\_\_\_\_ Departure Date \_\_\_\_\_  
☐ Sharing room with \_\_\_\_\_

### Room type

- ☐ Single (1 person - 1 bed) \$ 169  
☐ Double (2 persons - 1 bed) \$ 199  
☐ Db/Db (2 persons - 2 beds) \$ 199  
☐ Triple (3 persons - 2 beds) \$ 229  
☐ Quad (4 persons - 2 beds) \$ 259

Government rate

Not Available

\*All rates DO NOT include 17% STATE tax/ CITY OCCUPANCY tax. (subject to change)

Suites and upgraded accommodations are available upon request. Please call (800) 221-3531 for additional information.

### Special requests

- ☐ ADA room required:  
\_\_\_\_ Audio \_\_\_\_ Visual \_\_\_\_ Mobile  
☐ Rollaway / crib: \_\_\_\_\_  
☐ Other: \_\_\_\_\_

## METHOD OF HOUSING RESERVATION

- ☐ Please use the same method of payment as above.

**Credit Card:** Credit cards will be used to guarantee the reservation.

☐ Amer Express ☐ Visa ☐ MasterCard ☐ Discover  
Card # \_\_\_\_\_  
Cardholder (please print) \_\_\_\_\_  
Exp Date (mm/yy) \_\_\_\_\_ Security Code \_\_\_\_\_  
Signature \_\_\_\_\_

**Checks:** Payment must be in U.S. currency drawn on a U.S. bank. Please make check payable to ALEC and send to above address.

**Note:** Cutoff for reservations at the ALEC rate is April 6, 2011. After April 6, 2011, every effort will be made to accommodate new reservations, based on availability and rate.

## HOUSING CONFIRMATION INFORMATION

Online reservations will receive immediate email confirmation. Reservations received by form will be confirmed via email, fax, or mail within 72 hours of receipt.

## HOUSING CANCELLATION / REFUND INFORMATION

Credit cards will be charged one night room and tax in the event of a no show or if cancellation occurs within 72 hours prior to arrival. Departures prior to the departure date confirmed by the hotel at check-in will result in a charge of early departure fee \$100. Please obtain a cancellation number when your reservation is cancelled.



# SPOUSE / GUEST REGISTRATION FORM

Hilton Cincinnati Netherland Plaza -  
Cincinnati, OH

April 28-29, 2011



Online  
www.alec.org

Fax (credit cards only)  
202.331.1344

Phone / Questions • Mon-Fri, 9am-5:30 pm Eastern  
202.742.8538

Mail • ALEC Registration & Housing  
P.O. Box 96754 • Washington, DC 20090-6754

## ATTENDEE INFORMATION IS REQUIRED TO REGISTER A SPOUSE OR GUEST

Prefix (required) ☐ Sen ☐ Rep ☐ Del ☐ Mr ☐ Mrs ☐ Ms ☐ Other \_\_\_\_\_

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ Middle Initial \_\_\_\_\_ Badge Nickname \_\_\_\_\_

Title \_\_\_\_\_

Organization (required) \_\_\_\_\_

Address \_\_\_\_\_ Suite # \_\_\_\_\_

City \_\_\_\_\_ State/Province \_\_\_\_\_ Country \_\_\_\_\_ ZIP/Postal code \_\_\_\_\_

Daytime phone \_\_\_\_\_ Fax \_\_\_\_\_ Alternate phone \_\_\_\_\_

Email (confirmation will be sent by email) \_\_\_\_\_

## SPOUSE / GUEST REGISTRATION

### SPOUSE / GUEST REGISTRATION GUIDELINES

1. Spouse / guest registration is meant to accommodate legal spouse and immediate family members.
2. Attendees from the same organization must register independently. No exception will be made.
3. Spouse / guest designation will be clearly visible on name badge.

Last Name _____	First Name _____	Middle initial _____	Badge Nickname _____
Last Name _____	First Name _____	Middle initial _____	Badge Nickname _____
Last Name _____	First Name _____	Middle initial _____	Badge Nickname _____

	Number of Spouse/Guest(s)	Rate	TOTAL
<input type="checkbox"/> Spouse / Guest please note name(s) above	_____	\$ 50	\$ _____

### METHOD OF SPOUSE / GUEST REGISTRATION PAYMENT

**Credit Card:** Credit cards will be charged immediately. Please fax to the above number for processing.

<input type="checkbox"/> Amer Express	Card # _____
<input type="checkbox"/> Visa	Cardholder (please print) _____
<input type="checkbox"/> MasterCard	Exp Date (mm/yy) _____ Security Code _____
	Signature _____

**Checks:** Payment must be in U.S. currency drawn on a U.S. bank. Please make check payable to ALEC Registration and send to above address.

**Note:** If registering after April 6, 2011, please bring completed form and payment to register on-site.

### REGISTRATION CONFIRMATION INFORMATION

Online registrants will receive immediate email confirmation to the address provided above. If registering by form, confirmation will be emailed, faxed, or mailed within 72 hours of receipt of payment.

### REGISTRATION CANCELLATION / REFUND INFORMATION

Registrations cancelled prior to 5pm Eastern April 6, 2011, are subject to a \$100 cancellation fee. Registrations are non-refundable after 5pm Eastern April 6, 2011.

# AMERICAN LEGISLATIVE EXCHANGE COUNCIL

## Civil Justice Task Force Luncheon

*Sponsored by the U.S. Chamber Institute for Legal Reform and*  
Spring Task Force Summit | Hilton Cincinnati Netherland Plaza | Cincinnati, Ohio  
April 29, 2011 | 12:30 p.m. – 1:30 p.m.

**12:30 p.m. Buffet Luncheon**  
*Please serve yourself.*

**12:45 p.m. Plenary Speaker**  
*Bill McInturff, Public Opinion Strategies*

Mr. McInturff is a founding partner of Public Opinion Strategies and keeps a pulse on public opinion on complicated public policy issues like tort reform. He will be offering relevant polling data and will help attendees shape their messages as they encourage tort reform proposals around the country. This session will be interactive. Attendees are encouraged to come with questions.

**1:30 p.m. Networking Break**

**2:00 p.m. Task Force Meeting Convenes**



# AMERICAN LEGISLATIVE EXCHANGE COUNCIL

## Civil Justice Task Force Meeting

Spring Task Force Summit | Hilton Cincinnati Netherland Plaza | Cincinnati, Ohio  
April 29, 2011 | 2:00 p.m.-5:00 p.m.

**2:00 p.m. Welcome and Introductions**

*Senator William J. Seitz, III (OH), Civil Justice Task Force Co-Chair  
Victor Schwartz, Partner, Shook, Hardy & Bacon; Civil Justice Task Force Co-Chair*

**2:15 p.m. Task Force Update and Discussion of Task Force Mission Statement**

*Amy Kjose, Civil Justice Task Force Director, ALEC*

**2:25 p.m. Civil Justice State Legislative Reform Update**

*Matt Fullenbaum, Director of Legislation, American Tort Reform Association (ATRA)*

**2:35 p.m. SPECIAL PRESENTATION: The Status of the Judiciary**

*Mary Campbell McQueen, President, National Center for State Courts*

Ms. McQueen will share information on the compensation, budgets and resources of the judiciary and will discuss possible legislative solutions that are mindful of the current economic environment. Furthermore, she will provide insight into a few ways that legislators may be able to work with the judiciary to implement legal reforms.

**2:55 p.m. DISCUSSION: Texas Voluntary Compensation Plan**

*Lee Parsley, Texas Civil Justice League (invited)*

Mr. Parsley will discuss an innovative piece of legislation in Texas that encourages the use of voluntary compensation plans where applicable in lieu of the tort system.

**3:15 p.m. DISCUSSION: The Phantom Damages Elimination Act**

*Victor Schwartz, Partner Shook, Hardy & Bacon; Civil Justice Task Force Co-Chair*

*The Phantom Damages Elimination Act would allot damages to plaintiffs based on the actual medical expenses paid or expected to be paid rather than on the sticker price. Attendees will discuss the model with the intent to vote on a final version at the Annual Meeting.*

**3:35 p.m. Tort Reform in the States: Reflections from Across the Country**

**Wisconsin: Straight out of the Gates**

*Andy Cook, Wisconsin Civil Justice Council*

**Tort Reform, Texas Style**

*Lee Parsley, Texas Civil Justice League (invited)*

**Florida: Incremental Reform**

*William Large, Florida Justice Reform Institute (invited)*

**4:15 p.m.      DISCUSSION AND VOTE: Resolution in Support of Fair Recourse and Effective Deterrence against Frivolous Claims**

*Cary Silverman, Shook Hardy & Bacon LLP*

The *Resolution in Support of Fair Recourse and Effective Deterrence against Frivolous Claims* is intended to support activity on both the federal and state levels to strengthen rules punishing the filing of frivolous lawsuits. The Task Force will vote on the Resolution at this meeting as Congress is quickly considering the *Lawsuit Abuse Reduction Act*, aimed at improving the protections for defendants victimized by frivolous claims.

**4:35 p.m.      ROUNDTABLE DISCUSSION: Legislative Victories and Prospects for 2011**

*Moderated by Senator William J. Seitz, III (OH), Civil Justice Task Force Co-Chair*

This session will provide Civil Justice Task Force members in attendance the opportunity to discuss legislative achievements and goals for 2011.

**4:55 p.m.      For the Good of the Order**

**5:00 p.m.      Adjournment**



COMMON SENSE  
Holding Power Accountable





## **Mission Statement**

The American Legislative Exchange Council's mission is...

To advance the Jeffersonian Principles of free markets, limited government, federalism, and individual liberty through a nonpartisan public-private partnership among America's state legislators, concerned members of the private sector, the federal government, and the general public.

To promote these principles by developing policies that ensure the powers of government are derived from, and assigned to, first the People, then the States, and finally the Federal Government.

To enlist state legislators from all parties and members of the private sector who share ALEC's mission.

To conduct a policy making program that unites members of the public and private sector in a dynamic partnership to support research, policy development, and dissemination activities.

To prepare the next generation of political leadership through educational programs that promote the principles of Jeffersonian democracy, which are necessary for a free society.





## **American Legislative Exchange Council TASK FORCE OPERATING PROCEDURES**

### ***I. MISSION OF TASK FORCES***

Assume the primary responsibility for identifying critical issues, developing ALEC policy, and sponsoring educational activities which advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty. The mission will be accomplished through a non-partisan, public and private partnership between ALEC's legislative and private sector members in the specific subject areas assigned to the Task Force by the Board of Directors.

### ***II. TASK FORCE RESPONSIBILITIES***

- A. Task Forces have the primary responsibility for identifying critical issues and developing ALEC's official policy statements and model legislation appropriate to the specific subject areas of the Task Force.
- B. Task Forces serve as forums for an exchange of ideas and sharing of experiences between ALEC's state legislator and private sector members.
- C. Task Forces are responsible for developing and sponsoring the following educational activities appropriate to the specific subject area of the Task Force:
  - publications that express policy positions, including, but not limited to State Factors and Action Alerts;
  - educational communication and correspondence campaigns;
  - issue specific briefings, press conferences and press campaigns;
  - witness testimony and the activities of policy response teams;
  - workshops at ALEC's conferences; and
  - specific focus events.
- D. The Executive Director is to ~~Task Forces are responsible for developing an annual budgets,~~ which shall include expenses associated with Task Force meetings and educational activities. A funding mechanism to finance all meetings and educational activities proposed by Task Forces must be available before they can be undertaken.

### **III. GENERAL PROCEDURES**

- A. Requests from ALEC members for policy statements, model legislation and educational activities shall be directed by the Executive Director to the appropriate Task Force, or the Board of Directors if the issue does not fall within the jurisdiction of any Task Force. The appropriate Public and Private Sector Task Force Co-Chairs determine the agenda for each Task Force meeting, and the meetings will be called and conducted in accordance with these Operating Procedures.

The Director of Policy with the consent of the Executive Director assigns a model bill or resolution to the most appropriate Task Force based on Task Force content and prior jurisdictional history 35 days before a Task Force Meeting. All Task Force Co-Chairs will be provided an email or fax summary of all model bills and resolutions 35 days before the Task Force meeting

If both the Co-Chairs of a Task Force are in agreement that they should have jurisdiction on model legislation or a resolution, the legislation or resolution will be considered by the Task Force. If the other Task Force Co-Chairs believe they should have jurisdiction or if the author of the model bill or resolution does not agree on the jurisdictional assignment of the bill, they will have 10 days after the 35-day mailer deadline to submit in writing or by electronic appeal to the Director of Policy their intent to challenge the jurisdiction assignment. The Director of Policy will notify the Executive Director who will in turn notify the National Chair and the Private Enterprise Board Chair. The National Chair and the Private Enterprise Board Chair will in turn refer the matter in question to the Board of Directors Task Force Board Committee. The Director of Policy will establish a conference call for the Task Force Board Committee co- chairs, the author, the affected Task Force Co-Chairs and the Director of Policy at a time convenient for all participants.

The Task Force Board Committee Co-Chairs shall listen to the jurisdictional dispute by phone or in person within 10 days of the request. If both Task Force Board Committee Co-Chairs are in agreement that the Director of Policy made an incorrect jurisdictional referral, only then will the model bill or resolution be reassigned to a committee as they specify once agreed upon by the National Chair and the Private Enterprise Board Chair. The bill or model resolution is still eligible to be heard in whatever Task Force it is deemed to be assigned to as if submitted to the correct Task Force for the 35-day mailer. The National Chair and the Private Enterprise Board Chair decision is final on this model bill or resolution.

Joint referral of model legislation and/or resolutions are allowed if all the affected Task Force Co-Chairs agree. All model legislation and resolutions that have been referred to, more than one Task Force must pass the identical language in both Task Forces within two consecutive Task Force meetings. It is at the Task Force

Co-Chairs discretion how they will handle the hearings of the model legislation or resolution. Both sets of co-chairs have the ability to call a working group, subcommittee, or simply meet consecutively or concurrently if necessary.

If the Task Force co-chairs both agree to waive jurisdiction, they may do so as long as another Task Force still has jurisdiction.

The National Chair and the Private Sector Board Chair will rely upon the Task Force Board Committee Co-Chairs for advice and recommendations on model legislation or resolutions when no jurisdiction in any of the existing Task Forces in operation can be found. The Task Force Board Committee Co-Chairs will work with the Executive Director and the Director of Policy to identify public and private sector Task Force members (not alternates) from the existing Task Forces should their expertise be of assistance to the Task Force Board Committee in reaching a determination and recommendation for approval by the National Chair and the Private Enterprise Board Chair.

- B. The National Chair and the Private Sector Board Chair will rely upon the Task Force Board Committee Co-Chairs for advice and recommendations on model legislation or resolutions when no jurisdiction in any of the existing Task Forces in operation can be found. The Task Force Board Committee Co-Chairs will work with the Executive Director and the Director of Policy to identify public and private sector Task Force members (not alternates) from the existing Task Forces should their expertise be of assistance to the Task Force Board Committee in reaching a determination and recommendation for approval by the National Chair and the Private Enterprise Board Chair.
- C. The Board of Directors shall have ultimate authority over Task Force procedures and actions including the authority to create, to merge or to disband Task Forces and to review Task Force actions in accordance with these Operating Procedures. Nothing in these Operating Procedures prohibits the Board of Directors from developing ALEC policy; however, such a practice should be utilized only in exceptional circumstances. Before the policy is adopted by the Board of Directors, it should be sent to the Public and Private Sector Task Force Co-Chairs under whose jurisdiction the matter falls for review and comment back to the Board of Directors.
- D. The operating cycle of a Task Force is two years. A new operating cycle begins on January 1 of each odd numbered year and ends on December 31 of the following even numbered year. Task Force activities shall be planned and budgeted on an annual basis within each two-year operating cycle.
- E. ~~At the ALEC Annual Meeting, each Task Force will be responsible for determining an operating budget for the succeeding calendar year. The Executive Director will notify the Task Force Co-Chairs, at the ALEC Annual Meeting, what inflation factor will be used by the Task Force to determine the operating~~

~~and programming budgets. Task Force membership and budget information will be reported to the Executive Director by the Public and Private Sector Task Force Co-Chairs. The Executive Director will present this information to the Board of Directors at its regular fall meeting.~~

- F. If a Task Force is unable to develop an operating budget, the Board of Directors will determine whether to continue the operations of the Task Force. This determination will be made according to: (1) the level of membership on the Task Force, and (2) the need for continued services developed by the Task Force for ALEC.
- G. The Board of Directors shall have the authority to allocate limited general support funds to finance the annual operating budget of Task Forces that meet the requirements prescribed in Section III (E). The Executive Director shall determine, and report to the Board of Directors, the amount of general support funds available to underwrite such Task Forces.

#### **IV. MEMBERSHIP AND MEMBER RESPONSIBILITIES**

- A. The membership of a Task Force consists of legislators who are members in good standing of ALEC and are duly appointed to the Task Force, in accordance with Section VI (A) and private sector organizations that are full members of ALEC, contribute to the assessment for the Task Force operating budget, and are duly appointed to the Task Force, in accordance with Section VI (B). Private sector organizations that were full members of ALEC and contributed the assessment for the Task Force's operating budget in the previous year, can be appointed to the Task Force for the current year, conditional upon renewal of full ALEC membership and receipt of the current year's assessment for the Task Force operating budget prior to March 31<sup>st</sup>, unless an alternative date has been approved by the Executive Director.
- B. Each Task Force shall have least two Co-Chairs; a Public Sector Task Force Co-Chair and a Private Sector Task Force Co-Chair. The Public Sector Task Force Co-Chair must be a member of the Task Force and appointed in accordance with Section VI (A). The Private Sector Co-Chair must represent a private sector member of the Task Force and be appointed in accordance with Section VI(B). The Co-Chairs shall be responsible for:
  - (1) calling the Task Force and the Executive Committee meetings to order, setting the agenda and co-chairing such meetings;
  - (2) appointing and removing legislators and private sector members to and from the Task Force Executive Committee and subcommittees;
  - (3) creating subcommittees, and determining each subcommittee's mission, membership limit, voting rules, deadlines, and term of service; and



- (4) selecting Task Force members to provide support for and against Task Force policies during formal Board reviews.
- C. Each Task Force shall have an Executive Committee appointed by the Public and Private Sector Task Force Co-Chairs that is appropriate in number to carry out the work product and strategic plan of ALEC and the Task Force. The Executive Committee shall consist of the Public Sector Task Force Co-chair, the Private Sector Task Force Co-Chair, the subcommittee co-chairs, and the remainder will be an equal number of legislative and private sector Task Force members. The Executive Committee will be responsible for determining the operating budget and proposing plans, programs and budgets for the succeeding year in accordance with (Section V (B); determining if a proposed educational activity conforms to a previously approved model bill, resolution or policy statement in accordance with (Section IX (F); and determining if an emergency situation exists that justifies waiving or reducing appropriate time limits in accordance with (Section VIII (H)).
- D. Each Task Force may have any number of subcommittees, consisting of Task Force members and advisors to focus on specific areas and issues and make policy recommendations to the Task Force. The Task Force Co-chairs, shall create subcommittees and determine each subcommittee's mission, membership limit, voting rules, deadlines, and term of service. Any model bill, resolution or policy statement approved by a subcommittee must be approved by the Task Force before it can be considered official ALEC policy.
- E. Each Task Force may have advisors, appointed in accordance with Section VI (G). Advisors shall assist the members and staff of the Task Force. They shall be identified as advisors on official Task Force rosters, included in all official Task Force mailings and invited to all Task Force meetings. Advisors may also have their expenses paid at Task Force meetings covered by the Task Force operating budget with the approval of the Task Force Co-Chairs. An advisor cannot be designated as the primary contact of a private sector Task Force member, cannot be designated to represent a private sector Task Force member at a Task Force, Executive Committee, or subcommittee meeting, and cannot offer or vote on any motion at a Task Force, Executive Committee, or subcommittee meeting.

## ***V. Task Force Budgets***

- A. Each Task Force shall develop and operate a yearly budget to fund meetings.
- B. The operating budget shall be used primarily to cover expenses for Task Force meetings, unless specific funds within the budget are authorized for other use by the Task Force. The operating budget shall be assessed equally among the private sector members of the Task Force. The Executive Director, in consultation with the Task Force Co-Chairs shall determine which costs associated with each meeting will be reimbursed from the operating budget. Any funds remaining in a

Task Force's operating budget at the end of a year are transferred to ALEC's general membership account.

- C. The operating budget shall not be used to cover Task Force meeting expenses associated with alternate task force members' participation, unless they are appointed by their State Chair to attend the Spring Task Force Summit with the purpose to serve in place of a Task Force Member who is unable to attend. Task Force meeting expenses of alternate task force members shall be covered by their state's scholarship account.
- D. The programming budget shall be used to cover costs associated with educational activities. Contributions to the programming budget are separate, and in addition to operating budget contributions and annual general support/membership contributions to ALEC. The Executive Director shall determine the contribution required for each educational activity.

#### ***VI. PROCESS FOR SELECTING TASK FORCE MEMBERS, CHAIRS, COMMITTEES AND ADVISORS***

- A. Prior to February 1 of each odd-numbered year, the current and immediate past National chairman will jointly select and appoint in writing three legislative members and three alternates to the Task Force who will serve for the current operating cycle, after receiving nominations from ALEC's Public and Private State Chairs, the Executive Director and the ALEC Public and Private Sector members of the Board. At any time during the year, the National Chairman may appoint in writing new legislator members to each Task Force, except that no more than three legislators from each state may serve as members of any Task Force, no legislator may serve on more than one Task Force and the appointment cannot be made earlier than thirty days after the new member has been nominated. In an effort to ensure the nonpartisan nature of each Task Force, it is recommended that no more than two legislators of any one political party from the same state be appointed to serve as members of any Task Force. A preference will be given to those ALEC legislator members who serve on or chair the respective Committee in their state legislature. A preference will be given to legislators who sponsor ALEC Task Force model legislation in the state legislature.
- B. Prior to January 10 of each odd-numbered year, the current and immediate past National Chairman will jointly select and appoint in writing the Task Force Chair who will serve for the current operating cycle, after receiving nominations from the Task Force. Nominations will be requested by the outgoing Task Force Chair and may be placed in rank order prior to transmittal to the Executive Director no later than December 1 of each even-numbered year. No more than five names may be submitted in nomination by the outgoing Task Force chair. The current and immediate past National Chairmen will jointly make the final selection, but

should give strong weight to the recommendations of the outgoing Task Force Chair. In an effort to empower as many ALEC leaders as possible, State Chairs and members of the Board of Directors will not be selected as Task Force Chairs. Task Force Chairs shall serve for one operating cycle term. Where special circumstances warrant, the current and immediate past National Chairmen may reappoint a Task Force Chair to a second operating cycle term.

- C. Prior to February 1 of each odd numbered year, the Public and Private Sector Task Force Co-Chairs will select and appoint in writing the legislative and private sector members of the Task Force Executive Committee, who will serve for the current operating cycle. The Public and Private Sector Task Force Co-Chairs will select and appoint in writing the legislative and private sector members and advisors to any subcommittee.
- D. Prior to February 1 of each year, the Private Enterprise Board Chair and the immediate past Private Enterprise Board Chair will select and appoint in writing the private sector members to the Task Force who will serve for the current year. The appointment letter shall be mailed to the individual designated as the primary contact for the private sector entity. At any time during the year, the Chair of the Private Enterprise Board may appoint in writing new private sector members to each Task Force, but no earlier than thirty days after the new member has qualified for full membership in ALEC and contributed the assessment for the appropriate Task Force's operating budget.
- E. Prior to January 10 of each odd-numbered year, the Chair of the Private Enterprise Board and the immediate past Private Enterprise Board Chair will select and appoint in writing the Task Force Private Sector Co-Chair who will serve for the current operating cycle, after receiving nominations from the Task Force. Nominations will be requested by the outgoing Task Force Private Sector Chair and may be placed in rank order prior to transmittal to the Chair of the Private Enterprise Board. The Chair and the immediate past Chair of the Private Enterprise Board will make the final selection, but should give strong weight to the recommendations of the outgoing Private Sector Task Force Co-Chair. In an effort to empower as many ALEC private sector members as possible, Private Enterprise State Chairs and members of the Private Enterprise Board will not be selected as Private Sector Task Force Co-Chairs. Private Sector Task Force Co-Chairs shall serve for one operating cycle term. Where special circumstances warrant, the current and immediate past Chair of the Private Enterprise Board may reappoint a Task Force Private Sector Chair to a second operating cycle term.
- F. Prior to February 1 of each odd-numbered year, the Task Force Private Sector Co-Chair will select and appoint in writing the private sector members of the Task Force Executive Committee, who will serve for the current operating cycle. The Task Force Private Sector Co-Chair shall select and appoint in writing the private sector members of any subcommittees.

- G. The Public and Private Sector Task Force Co-Chairs, may jointly appoint subject matter experts to serve as advisors to the Task Force. The National Chair and the Private Enterprise Board Chair may also jointly recommend to the Task Force Co-Chairs subject matter experts to serve as advisors to the Task Force.

## ***VII. REMOVAL AND VACANCIES***

- A. The National Chair may remove any Public Sector Task Force Co-Chair from his position and any legislative member from a Task Force with or without cause. Such action will not be taken except upon thirty days written notice to such Chair or member whose removal is proposed. For purposes of this subsection, cause may include failure to attend two consecutive Task Force meetings.
- B. The Public Sector Task Force Co-Chair may remove any legislative member of an Executive Committee or subcommittee from his position with or without cause. Such action shall not be taken except upon thirty days written notice to such member whose removal is proposed. For purposes of this subsection, cause may include failure to attend two consecutive meetings.
- C. The Chairman of the Private Enterprise Board may remove any Private Sector Task Force Co-Chair from his position and any private sector member from a Task Force with cause. Such action shall not be taken except upon thirty days written notice to such Chair or member whose removal is proposed. For purposes of this subsection, cause may include but is not limited to the non-payment of ALEC General Membership dues and the Task Force dues. .
- D. The Private Sector Task Force Co-Chair may remove any private sector member of an Executive Committee or subcommittee from his position with cause. Such action shall not be taken except upon thirty days written notice to such member whose removal is proposed. For purposes of this subsection, cause may include but is not limited to the non-payment of ALEC General Membership dues and the Task Force dues.
- E. The Public and Private Sector Task Force Co-Chairs may remove an advisor from his position with or without cause. Such action shall not be taken except upon thirty days written notice to such advisor whose removal is proposed.
- F. Any member or advisor may resign from his position as Public Sector Task Force Co-Chair, Private Sector Task Force Co-Chair, public or private sector Task Force member, Task Force advisor, Executive Committee member or subcommittee member at any time by writing a letter to that effect to the Public Sector and Private Sector Task Force Co-Chairs. The letter should specify the effective date of the resignation, and if none is specified, the effective date shall be the date on which the letter is received by the Public and Private Task Force Co-Chairs.



- G. All vacancies for Public Sector Task Force Co-Chair, Private Sector Task Force Co-Chair, Executive Committee member and subcommittee member shall be filled in the same manner in which selections are made under Section VI. All vacancies to these positions must be filled within thirty days of the effective date of the vacancy.

### **VIII. MEETINGS**

- A. Task Force meetings shall only be called by the joint action of the Public and Private Sector Task Force Co-Chairs. Task Force meetings cannot be held any earlier than thirty-five days after being called, unless an emergency situation has been declared pursuant to Section VIII(H), in which case Task Force meetings cannot be held any earlier than ten days after being called. It is recommended that, at least once a year, the Task Forces convene in a common location for a joint Task Force Summit. Executive Committee meetings shall only be called by the joint action of the Public and Private Sector Task Force Co-Chairs and cannot be held any earlier than three days after being called, unless the Executive Committee waives this requirement by unanimous consent.
- B. At least forty-five days prior to a task force meeting any model bill, resolution or policy must be submitted to ALEC staff that will be voted on at the meeting. At least thirty-five days prior to a Task Force meeting, ALEC staff shall distribute copies of any model bill, resolution or policy statement that will be voted on at that meeting. This requirement does not prohibit modification or amendment of a model bill, resolution or policy statement at the meeting. This requirement may be waived if an emergency situation has been declared pursuant to Section VIII(H).
- C. All Task Force meetings are open to registered attendees and invited guests of ALEC meetings and conferences. Only regular Task Force Members may introduce any resolution, policy statement or model bill. Only Task Force members will be allowed to participate in the Task Force meeting discussions and be seated at the table during Task Force meetings, unless otherwise permitted by the Public and Private Sector Task Force Co-Chairs.
- D. ALEC private sector member organizations may only be represented at Task Force and Executive Committee meetings by the individual addressed in the appointment letter sent pursuant to Section VI(D) or a designee of the private sector member. If someone other than the individual addressed in the appointment letter is designated to represent the private sector member, the designation must be submitted in writing to the Public and Private Sector Task Force Co-Chairs before the meeting, and the individual cannot represent any other private sector member at the meeting.

- E. All Task Force and Executive Committee meetings shall be conducted under the guidelines of Roberts Rules of Order, except as otherwise provided in these Operating Procedures. A copy of the Task Force Operating Procedures shall be included in the briefing packages sent to the Task Force members prior to each meeting.
- F. A majority vote of legislative members present and voting and a majority vote of the private sector members present and voting, polled separately, are required to approve any motion offered at a Task Force or Executive Committee meeting. A vote on a motion to reconsider would be only with the sector that made the motion. Members have the right, in a voice vote, to abstain and to vote present by roll-call vote. In all votes a member can change their vote up until the time that the result of the vote is announced. Only duly appointed members or their designee as stated in Section VIII (D) that are present at the meeting may vote on each motion. No proxy, absentee or advance voting is allowed.
- G. The Public Sector Task Force Co-Chair and the Private Sector Task Force Co-Chair, with the concurrence of a majority of the Executive Committee, polled in accordance with Section VIII (F), may schedule a Task Force vote by mail or ~~fax~~ any form of electronic communication on any action pertaining to policy statements, model legislation or educational activity. The deadline for the receipt of votes can be no earlier than thirty-five days after notification of the vote is mailed or ~~faxed~~ notified by any form of electronic communication, unless an emergency situation is declared pursuant to Section VIII (H), in which case the deadline can be no earlier than ten days after notification is mailed or ~~faxed~~ notified by any form of electronic communication. Such votes are exempt from all rules in Section VIII, except: (1) the requirement that copies of model legislation and policy statements be mailed or ~~faxed~~ notified by any form of electronic communication with the notification of the vote and (2) the requirement that a majority of legislative members voting and a majority of the private sector members voting, polled separately, is required to approve any action by a Task Force.
- H. For purposes of Sections VIII(A), (B) and (G), an emergency situation can be declared by:
- (1) Unanimous vote of all members of the Task Force Executive Committee present at an Executive Committee meeting prior to the meeting at which the Task Force votes on the model bill, resolution or policy statement; or
  - (2) At least three-fourth majority vote of the legislative and private sector Task Force members (voting in accordance with Section VIII (F)) present at the meeting at which the members vote on the model bill, resolution or policy statement.

- I. Ten Task Force members shall constitute a quorum for a Task Force meeting. One-half of the legislative and one-half of the private sector members of an Executive Committee shall constitute a quorum for an Executive Committee meeting.

IX. **REVIEW AND ADOPTION PROCEDURES**

- A. All Task Force policy statements, model bills or resolutions shall become ALEC policy either: (1) upon adoption by the Task Force and affirmation by the Board of Directors or (2) thirty days after adoption by the Task Force if no member of the Board of Directors requests, within those thirty days, a formal review by the Board of Directors. General information about the adoption of a policy position may be announced upon adoption by the Task Force.
- B. The Executive Director shall notify the Board of Directors of the approval by a Task Force of any policy statement, model bill or resolution within ten days of such approval. Members of the Board of Directors shall have thirty days from the date of Task Force approval to review any new policy statement, model bill or resolution prior to adoption as official ALEC policy. Within those thirty days, any member of the Board of Directors may request that the policy be formally reviewed by the Board of Directors before the policy is adopted as official ALEC policy.
- C. A member of the Board of Directors may request a formal review by the Board of Directors. The request must be in writing and must state the cause for such action and a copy of the letter requesting the review shall be sent by the National Chairman to the appropriate Task Force Chair. The National Chairman shall schedule a formal review by the Board of Directors no later than the next scheduled Board of Directors meeting.
- D. The review process will consist of key members of the Task Force, appointed by the Task Force Chair, providing the support for and opposition to the Task Force position. Position papers may be faxed or otherwise quickly transmitted to the members of the Board of Directors. The following is the review and adoption procedures:
- Notification of Committee: Staff will notify Task Force Chairs and the entire task force when the Board requests to review one of the Task Forces' model bills or resolutions.
  - Staff Analysis: Will be prepared in a neutral fashion. The analyses will include:
    - History of Task Force action
    - Previous ALEC official action/resolutions
    - Issue before the board
    - Proponents arguments

- Opponents arguments
- Standardized Review Format: To ensure fairness, a set procedure will be used as the format to ensure the model bill/resolution has a fair hearing before the Board.
  - Task Force Chair(s) will be invited to attend the Board Review
  - Task Force Chair(s) will decide who will present in support and in opposition for the model bill/resolution before the Board.
  - Twenty minutes that is equally divided will be given for both sides to present before the Board.
  - It is suggested that the Board not take more than twenty minutes to ask questions of the presenters.
  - Presenters will then be excused and the Board will have a suggested twenty more minutes for discussion and vote.
  - All votes will be recorded for the official record.
- Notification of Committee: The Director of Policy will notify presenters immediately after the vote. If the Board votes to send the model bill/resolution back to the task force, the Board will instruct the Director of Policy or another board member what to communicate.

E. The Board of Directors can:

- (1) Vote to affirm the policy or affirm the policy by taking no action, or
- (2) Vote to disapprove the policy, or
- (3) Vote to return the policy to the Task Force for further consideration providing reasons therefore.

F. Task Forces may only undertake educational activities that are based on a policy statement, model bill or resolution that has been adopted as official ALEC policy, unless the Task Force votes to undertake the educational activity, in which case the educational activity is subjected to the same review process outlined in this Section. It is the responsibility of the Task Force Executive Committee to affirm by three-fourths majority vote conducted in accordance with Section VIII that an educational activity conforms to a policy statement, model bill or resolution.

## **X. EXCEPTIONS TO THE TASK FORCE OPERATING PROCEDURES.**

Exceptions to these Task Force Operating Procedures must be approved by the Board of Directors.



**DRAFT Proposed Resolution for Consideration by ALEC**

**Resolution in Support of Fair Recourse and  
Effective Deterrence Against Frivolous Claims**

***Summary***

This resolution supports efforts to provide victims of frivolous lawsuits with an effective and fair means to seek reimbursement of their legal expenses. A single frivolous claim can easily cripple an individual or small business. Changes to the Federal Rules of Civil Procedure in 1993 left victims of frivolous claims with practically no recourse. The current federal rule provides unscrupulous lawyers with the ability to demand payment, even when a claim has no basis in law or fact, or is brought for purposes of harassment, without the threat of any economic consequences. Since many states courts conform their rules to those used in federal courts to provide for consistency between the systems, the 1993 change weakening the federal rule against frivolous lawsuits also adversely impacted state civil justice systems. This resolution urges Congress to amend Rule 11 to (1) eliminate the “safe harbor,” which permits those who file frivolous claims to withdraw them and thereby avoid any sanction; and (2) require that offending party pay the other side’s reasonable attorneys’ fees and court costs incurred as a direct result of the violation.

***Resolution***

**PURPOSE:** Urging Congress to strengthen Rule 11 of the Federal Rules of Civil Procedure, which provides the primary means of responding to frivolous claims filed in federal courts and which is followed by many state courts.

**WHEREAS,** frivolous claims include those that are (1) presented for an improper purpose, such as harassment; (2) are not warranted by existing law or a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) have no basis in fact and is not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; or (4) involve denials of factual contentions not warranted based on the evidence;

**WHEREAS,** obtaining dismissal of a single frivolous claim can require tens of thousands of dollars in legal expenses, and thereby place significant pressure on individuals and small businesses to settle completely unfounded cases, scale back operations, or file for bankruptcy protection;

**WHEREAS,** 1993 amendments to Rule 11 left victims of lawsuit abuse with no effective means of recourse and does not deter those who would bring frivolous claims by:

1. Requiring the lawyer for the party hit with a frivolous claim to undertake the additional expense of preparing a separate motion for sanctions, which he or she must send to the violator before filing it with the court. Under this “safe harbor,”

those who file frivolous claims may withdraw the claim within 21-days of receiving the motion without any obligation to reimburse the victim and without facing any penalty whatsoever.

2. Permitting courts to take no action even after finding a claim or defense is frivolous; and
3. Discouraging judges from requiring those who file frivolous claims to reimburse the victim for attorney's fees and costs by limiting sanctions to "what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."

**WHEREAS**, the 1993 changes were an overreaction to exaggerated concerns regarding application of the Rule in effect from 1983 until 1993;

**WHEREAS**, just two years prior to the 1993 amendment, 95% of surveyed federal judges believed that the prior version of Rule 11, which had strict penalties against frivolous claims, had an overall positive effect on practice and procedure and should not be changed, and three-quarters of those judges surveyed believed that the rule's benefits in deterring frivolous lawsuits and compensating those victimized by such claims justified the use of judicial time involved in resolving such motions;<sup>1</sup>

**WHEREAS**, the Advisory Committee itself recognized that while there was some legitimate criticism of Rule 11's application, such criticism was "frequently exaggerated or premised on faulty assumptions";<sup>2</sup>

**WHEREAS**, members of the U.S. Supreme Court criticized the amendments as "render[ing] the Rule toothless" and allowing parties "to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose,"<sup>3</sup> but some members nevertheless viewed their role in transmitting the amendment to Congress as "limited" to ensuring procedural requirements were satisfied;<sup>4</sup>

**WHEREAS**, Congress failed to intervene within a set seven-month period before the Rule automatically took effect;

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<sup>1</sup> Federal Judicial Center, Final Report on Rule 11 to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, May 1991.

<sup>2</sup> Amendments to Federal Rules of Civil Procedure and Forms, 146 F.R.D. 401, 523 (1993).

<sup>3</sup> *Id.* at 507-08 (Scalia, joined by Thomas, J.J., dissenting).

<sup>4</sup> *Id.* at 505 (Statement of White, J.) (noting that the Court routinely approved the Judicial Conference's recommendations "without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity"); *see also id.* at 401 (1993) (transmittal letter of Rehnquist, C.J.) (indicating that "[w]hile the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.").

**WHEREAS**, many state courts amended their rules of civil procedure with respect to frivolous claims to conform to federal Rule 11 based on a policy and practice of maintaining consistency with the federal rules to avoid forum shopping; and

**WHEREAS**, it is particularly important during these difficult economic times to provide victims of frivolous lawsuits with a fair opportunity to seek reimbursement of their legal expenses;

**THEREFORE, BE IT RESOLVED**, that the American Legislative Exchange Council supports amendment of Rule 11 of the Federal Rules of Civil Procedure that would:

1. Require imposition of sanctions when a claim or defense is found to be frivolous;
2. Eliminate the 21-day “safe harbor”; and
3. Fully authorize judges to order a party that brings a frivolous claim or defense to pay the victim’s reasonable attorney’s fees and costs incurred as a direct result of the violation;

**BE IT FURTHER RESOLVED**, that the American Legislative Exchange Council encourages state courts and legislatures that have modeled their rule against frivolous claims on the current federal Rule 11 to take similar action.



## **For Consideration by ALEC's Civil Justice Task Force**

### **The Phantom Damages Elimination Act**

#### ***Background***

In personal injury litigation, a responsible defendant pays for the plaintiff's medical care. The goal is for the plaintiff to be reimbursed for all of his or her reasonable and necessary expenses. The plaintiff is made whole. In most cases, however, defendants have to pay more, often multiple times what the plaintiff or his or her insurer ever had to pay, for the plaintiffs' medical care. This overpayment is what we call "phantom damages."

Phantom damages are the difference between the amount of medical expenses billed by a doctor (the "sticker price") and the amount that the plaintiff and his or her insurer actually paid for those services. Nobody ever paid these damages. The plaintiffs' insurer, Medicare or Medicaid have negotiated rates with health care providers. For example, a hospital may charge \$1,500 for an MRI, but the actual amount paid for that MRI might be \$500. The plaintiff may have paid a \$25 co-pay and the insurer paid the remaining \$475. Yet, in litigation, the defendant is often required to pay the full \$1,500 to the plaintiff -- \$1,000 more than anyone ever paid -- simply because that amount was printed on the original bill.

For instance, in a typical slip-and-fall accident case recently upheld by a divided Colorado Supreme Court, the amount paid by the plaintiff's insurer for his medical expenses came to \$43,236, while the amount billed, before application of the negotiated rate, was \$74,242. Yet, the defendant, the nonprofit Volunteers of America, was required to pay based on medical costs that included \$31,006 in medical discounts that the company had negotiated with healthcare providers. As this example shows, inclusion of such illusory costs can easily increase awards for damages in personal injury suits by 40% or more.

It is enormously wasteful for defendants to "over-compensate" plaintiffs for their medical bills. These costs are invariably passed on to consumers in the price of goods and services, including health care.

#### ***Interaction with Collateral Source Reform***

The phantom damages model act abrogates, in part, what is known as the "collateral source rule." The collateral source rule bars courts from considering compensation that the plaintiff has received from other sources. In many cases, the rule leads to double compensation of plaintiffs -- once from an insurer, then again through a lawsuit. The rule does not serve a compensatory purpose, but aims to not permit a defendant to benefit from a plaintiff's prudence in buying insurance. This is seen most clearly when a plaintiff has bought a life insurance policy.

Some courts consider a "negotiated rate" between an insurer and a health care provider as a benefit of the insurance policy and therefore require the jury to determine damages based on the fictional sticker price of medical care rather than the amount actually paid. Other courts find that such write-offs cannot be considered a collateral source because they are never paid and therefore cannot be considered to be "benefits." This is the more sound conclusion because the core basis of the collateral source rule, the plaintiff's prudence in purchasing insurance, is irrelevant.



The collateral source rule is a hot button issue for medical liability reform. On December 1, 2010, the President's National Commission on Fiscal Responsibility and Reform (a/k/a the "Deficit Commission") recommended modifying the collateral source rule to allow any outside source of income collected as a result of an injury to be considered in deciding awards.

Fully eliminating the collateral source rule is a broader and different reform than just determining a plaintiff's recovery based on the amount actually paid for his or her medical expenses. In sum, the ALEC model act provides an alternative, targeted approach to reducing litigation costs that serve no compensatory purpose. It does not intend, however, to impact states that have acted to eliminate the collateral source rule in certain cases.

### ***Where Reform is Needed***

Some states, such as Texas, have already removed phantom damages from litigation awards. In 2003, Texas enacted a provision stating that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." Tex. Civ. Prac. & Rem. Code § 41.0105. ALEC's model act is based on this Texas law as well as legislation recently introduced in Colorado.

In most states, courts have decided whether plaintiffs may recover the sticker price of medical expenses or the amount actually paid. Below is a general list of where states fall today. It is important to note that this case law is continually developing. In addition, some states may draw distinctions between private insurance, for which a plaintiff independently paid, Medicare, which is supported by taxes on employers and employees, and Medicaid, which is funded by taxpayers in general. Some states have fully eliminated the collateral source rule in medical malpractice cases, but not other personal injury actions. Legislators may contact the ALEC Civil Justice Task Force to evaluate the law of their states when developing legislation.

<b><u>Reform Needed</u></b>	<b><u>Not Needed</u></b>	<b><u>Law Uncertain</u></b>
Arizona	Alabama	Alaska
Colorado	California	Arkansas <sup>1</sup>
Delaware	Connecticut	Michigan
District of Columbia	Florida	Minnesota
Georgia	Idaho	Montana
Hawaii	Indiana	Nevada
Illinois	Maryland	New Jersey
Iowa	Massachusetts	New Mexico
Kansas <sup>2</sup>	Missouri	North Carolina
Kentucky	New Hampshire	North Dakota
Louisiana	New York	Oklahoma

<sup>1</sup> The Arkansas Supreme Court found that a state statute explicitly eliminating recovery for phantom damages was unconstitutional as a rule of evidence that violated separation of powers under the Arkansas Constitution. *Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009).

<sup>2</sup> Kansas courts have found that write offs are not a collateral source and are therefore admissible in Medicaid cases, but have excluded evidence of the amount actually paid in cases involving private insurance or Medicare.

Maine  
Mississippi  
Nebraska  
Oregon  
South Carolina  
South Dakota  
Virginia  
Washington  
Wisconsin

Ohio  
Pennsylvania  
Texas

Rhode Island  
Tennessee  
Utah  
Vermont  
West Virginia  
Wyoming

### ***Model Legislation***

**Section 1. {Title}.** This Act may be known as the Phantom Damages Elimination Act.

**Section 2. {Purpose}.** The purpose of this section is to abrogate the common-law collateral source rule and prevent compensatory damage awards for medical expenses from exceeding the amount accepted by the health care service provider for treating the injured party for reasonable and necessary health care services.

**Section 3. {Recovery of Medical or Health Care Expenses}.** In addition to any other limitation under law, recovery of expenses for medical or health care, treatment, or services shall include only those amounts actually paid by or on behalf of the injured person to the health care service providers who rendered care, treatment, or services. If payment for reasonable and necessary medical or health care, treatment, or services has not been made at the time of trial or arbitration, then the recoverable amounts shall be limited to the amounts customarily accepted by the health care service providers in satisfaction of their bills.

**Section 4. {Effective Date}.** This Act is effective upon enactment and shall apply to any action filed on or after the effective date of this Act.

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