

**Society of American Archivists
Council Meeting
August 10, 2009
Austin, Texas**

**Discussion Item: Study Committee on Authentication of
Online State Legal Materials**

**(Submitted by Robert Horton, SAA Representative to the
Authentication Study Committee)**

BACKGROUND

The National Conference of Commissioners on Uniform State Laws (NCCUSL) provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. NCCUSL's work supports the federal system and facilitates the movement of individuals and the business of organizations with rules that are consistent from state to state.

On January 11, 2008, NCCUSL's Scope and Program Committee adopted the following resolution:

RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a Study Committee on Authentication of Online Legal Materials be formed.

On January 12, 2008, the Executive Committee approved this recommendation. Following NCCUSL's 2008 Annual Meeting, the Study Committee on Authentication of Online State Legal Materials was appointed by President Martha Lee Walters. The study committee held four meetings via conference call, on October 22, 2008, January 5, 2009, February 17, 2009, and March 23, 2009. The study committee reviewed articles on the topics of authentication and preservation of online primary legal materials, and also prepared an outline draft of a proposed uniform law on this topic. After discussion of the issues and the initial draft, the study committee is recommending to the Committee on Scope and Program that a drafting committee be formed. (See **Appendix A** for more information.)

SAA's representative to the NCCUSL Authentication Study Committee, which studies the authentication of online legal documents, is Robert Horton.

According to Horton's report (**Appendix B**),

The report of the study committee was approved by the NCCUSL executive committee during its annual meeting (July 2009); NCCUSL will next form a drafting committee, probably to be chaired by Minnesota's Revisor of Statutes, Michele Timmons. The drafting committee will likely meet twice before the next annual meeting in Chicago, at which point it should be able to provide a text for a first reading, with final approval likely slated for the 2011 meeting.

*To frame its preliminary findings, the study committee provided a draft of a law for the authentication of legal materials [**Appendix C**]. This would be the basis of future work. To build on it, the executive committee made three specific recommendations:*

- 1. Include more observers e.g., from the judiciary: this law would affect a number of stakeholders, who should have a voice in the process.*
- 2. Schedule some technology demonstrations, to understand better the practical implications of any law.*
- 3. Analyze the costs of any recommendations or mandates, as these will significantly shape the likelihood of acceptance or rejection by state legislatures.*

Clearly, archivists should have a voice in this process.

DISCUSSION

The purpose of this discussion item is to provide direction to Horton, as SAA's representative, on what specific provisions of the law SAA would like to see.

APPENDIX A

To: Committee on Scope and Program
From: Study Committee on Authentication of Online State Legal Materials
Date: April 30, 2009
Re: Report and Recommendation for Drafting Committee

On January 11, 2008, the Scope and Program Committee adopted the following resolution:

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- I. **Recommendation.** The Study Committee on Authentication of Online State Legal Materials recommends that the Uniform Law Commission form a drafting committee to prepare a draft uniform law describing minimum standards for the authentication and preservation of online state legal materials.

Virtually all states have primary legal materials online, and at least ten states and the District of Columbia have discontinued the printing of certain legal materials, publishing them only online. While states have moved rapidly into the electronic world, the establishment of public policy regarding the authentication and preservation of these online legal materials has lagged behind. The study committee believes it would be helpful to the states to create a uniform law that would describe the broad principles and minimum standards for the authentication and preservation of these important online documents.

- II. **Need for and benefits of uniformity.**

For primary state-level legal materials, including laws passed at a particular legislative session, codified laws of a state, administrative rules with the force and effect of law, and judicial opinions with precedential value, there is a high need for the public, lawyers, and judges to have access to accurate material. For many years, print versions of these documents have served as prima facie evidence of the originals. As the official publishers of these materials begin to discontinue print, there is a need to identify the steps necessary to make sure that online versions of these documents have a similar level of reliability and accuracy.

In addition, the emerging prevalence of online legal materials raises the issue of how the online versions can be made accessible into the long-term future. This may be a significant challenge, given the history we have all observed of frequently-changing electronic formats necessitating many data conversions. The issue is an important one, however, and there is a need to bring the issue of long-term preservation to the attention of state legislatures.

The creation of some uniform standards may also help with the researching of these materials across states, and possibly even internationally. Initial discussion by the study committee was to consider a type of “full faith and credit” provision during the drafting committee process, to address how the enacting state would deal with electronic legal material from another state.

III. Summary and Analysis of Existing State Law and Trends.

To the knowledge of study committee members, the best survey of existing state law and trends on this topic is the March, 2007, report prepared by the American Association of Law Libraries (AALL) entitled, “State-by-State Report on Authentication of Online Legal Resources.” The key findings of the report were summarized in the executive summary as follows:

1. States have begun to discontinue print official legal resources and substitute online legal sources.
2. Ten states and D.C. have deemed as official one or more of their online primary legal resources.
3. One or more of the online primary legal sources of eight states have “official traits”, where evidence as to the actual status of the resources is conflicting.
4. States have not acknowledged important needs of citizens and law researchers seeking government information; they have not been sufficiently deliberate in their policies and practices.
5. No state’s online primary legal resources are authenticated or afford ready authentication by standard methods.
6. Eight states have provided for permanent public access (PPA) to one or more of their online primary legal resources.

AALL is working on an update of this report, which should be available in May, 2009.

IV. Impact of Federal Laws and Regulations.

To the knowledge of study committee members, there are no federal laws or regulations which directly address the topics of authentication and preservation of state-level legal materials. There may be a need to coordinate with federal law, however, and a drafting committee would need to do additional research and consult further with knowledgeable persons, including Commissioner Pat Fry.

In addition, the federal government has developed an authentication system for federal legal materials, through the U.S. Government Printing Office. The GPO has named an observer to the study committee, and the federal expertise will be an invaluable resource if this project moves forward.

V. Identity of Interested Organizations.

There is a large amount of interest in this topic from governmental, non-profit, and private organizations, as evidenced by the fact that ten organizations have named observers to the study committee:

- American Association of Law Libraries – Barbara Bintliff
- American Bar Association – Judge Larry Craddock and Judge Edward Schoenbaum
- Association of Reporters of Judicial Decisions – Ralph Preston
- Council of State Archivists – Robert Horton
- Government Printing Office – Michael Wash
- LexisNexis – Anders Ganten
- National Association of Secretaries of State – Jeffrey Hague
- Society of American Archivists – Robert Horton
- Thomson Reuters – Ellen Gillespie
- University of Chicago Law School – Judith Wright

If this project progresses, there may be additional observers who wish to be added, or additional stakeholders may be identified.

VI. Available Resources.

The study committee did not discuss possible grant funding for this project during the conference calls, but subsequent email correspondence resulted in the identification of the following possible funding sources:

- The National Historical Publications and Records Commission (NHPRC) has some grant funding available. The grant funding appears to be targeted to practical projects that will digitize particular historical records, but that source might still be worth exploring.

- The Sedona Conference has done some interesting work on electronic evidence in legal cases. Their web site does not say anything specific about grants, but it may be worthwhile to contact that organization.

VII. Study Committee Draft.

The study committee prepared a draft of a potential uniform law, which is attached to this report. The draft outlines several of the major issues in this topic area:

- What documents should be covered by this law? The initial draft covers the laws passed at a particular legislative session, the codified laws of a state, the state administrative rules with the force and effect of law, and the judicial decisions of a state with precedential value. One of the issues raised by the study committee is whether legal materials produced by local governments which also have the force and effect of law should be covered.
- Do the authentication and preservation requirements apply to the enacting state, or also to other states? By clarifying in the definition of “document” that the law applies to materials generated by this state, the intent is to make the operative requirements of the statute applicable to the enacting state only. The study committee identified a need for more discussion, however, of a “full faith and credit” type provision to clarify the effect of this law on the laws passed by other states and displayed on the internet.
- Which publishers should be covered by the law, and how would the law apply to commercial publishers? The intent is to cover state-level official publishers of the defined documents, and to cover commercial publishers if they have been designated the official publisher by the responsible state government entity through a contractual relationship.
- Should the law apply when the internet version of the document is:
 - (a) the only one available (i.e., print has been discontinued), or
 - (b) when the electronic version has been deemed an official version (i.e., even if print is still available) or
 - (c) should it apply whenever the defined document is published on the web by the official publisher (i.e., even if there is still a print version)?
 The initial draft addresses the first two situations, but provides an “alternative version” that could be used as a starting point if the policy decision is to cover all three situations.
- Would it make more sense to cover the topic in a model law? The study committee consensus was to first try to cover the authentication and preservation standards at a broad conceptual level, and try to draft a uniform law. As the standards are revisited as part of the drafting committee process, this question should be revisited, especially if more detailed standards are desired. The study committee was quite unified, though, in a desire to avoid

selecting any one technology as the best one, and therefore felt a uniform approach was achievable.

- What is the cost of the authentication and preservation requirements? This question will definitely be an important consideration in a drafting committee, particularly with regard to enactability. The initial approach of the draft is to describe the minimum standards broadly enough that a wide range of cost options would satisfy them, and leave it up to each state to select the approach that works best for their needs and budget.

- Will we need to require some minimum number of print copies to achieve the goals of long-term preservation? The initial draft requires a preservation plan, and permits, but does not require, a print version for archiving. There is room for policy discussion, however, as to whether a print version would need to be required.

[Appendix C]: Study Committee Draft of a Uniform Authentication of Online State Legal Materials Act, dated April 30, 2009.

NCCUSL Report Authentication of Online State Legal Materials

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To frame its preliminary findings, the study committee provided a draft of a law for the authentication of legal materials (attached). This would be the basis of future work. To build on it, the executive committee made three specific recommendations:

4. include more observers e.g., from the judiciary): this law would affect a number of stakeholders, who should have a voice in the process.
5. schedule some technology demonstrations, to understand better the practical implications of any law.
6. analyze the costs of any recommendations or mandates, as these will significantly shape the likelihood of acceptance or rejection by state legislatures.

Clearly, archivists should have a voice in this process. The immediate impact of any law will fall on government archivists, especially in the states, but the standards and practices the law recommends will establish precedents that affect archivists in many other fields. As well, the concerns the study committee has raised about preservation are extremely important to the profession; a model law calling for additional investment in digital archives will be a welcome opportunity for archivists. At the very least, the issues that inform the law (e.g., concerns with costs, practicality and flexibility) should also inform us; we need to understand the business case that will appeal to legislatures.

Because of Minnesota's role in the Library of Congress-funded NDIIPP project to preserve digital legislative content, I have a vested interest in this work and the capacity to support my involvement ; Michele Timmons has asked me to be part of the drafting committee and, as part of the process, I would be happy to continue to serve as SAA's and/or CoSA's representative.

UNIFORM AUTHENTICATION OF ONLINE STATE LEGAL MATERIALS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Authentication of Online State Legal Materials Act.

SECTION 2. DEFINITIONS. In this [act]:

- (1) “Document” means state-level legal material, including:
 - A. laws passed by the state legislature of this state at a particular legislative session,
 - B. codified laws of this state,
 - C. state administrative rules of this state that have the force and effect of law, and,
 - D. judicial decisions of this state that have precedential value.
- (2) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (3) “Electronic document” means a document created, generated, sent, communicated, or stored by electronic means.
- (4) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(5) “Official Publisher” means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of a state government with the responsibility to publish a document, or a person designated under contract with the responsible agency or instrumentality of state government to publish a document.

(6) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(7) [Other definitions to be added]

SECTION 3. APPLICABILITY.

This [act] applies to an electronic document that is published only on the internet, or is published on the internet and is designated official.

SECTION 4. AUTHENTICATION OF ELECTRONIC DOCUMENTS.

The official publisher of an electronic document subject to this [act] must authenticate it. At a minimum, authentication must include:

- (1) documentation that the computer system used to create and store the document contains security measures designed to minimize corruption of or tampering with the document, and establishes a chain of custody for the document,
- (2) protection of the transmission of the document from the computer system in which it was created to the web site on which it is displayed, with an appropriate indicator of web site authentication, and

- (3) assurance that the document displayed on the web site is the document it purports to be and is complete, with an appropriate indicator of document authentication.

SECTION 5. PRIMA FACIE EVIDENCE.

If the publication of an electronic document meets the requirements in section 4 the electronic document is prima facie evidence that it is the complete document that it purports to be.

SECTION 6. PRESERVATION AND PERMANENT ACCESS.

The official publisher of an electronic document subject to this [act] must establish a plan both for preservation of the document and for permanent public access to the document. At a minimum, the plan must include:

- (1) documentation of the data format used in the original document creation,
- (2) periodic archiving of the data, in paper or electronic form or both, and
- (3) periodic updating of the document in new electronic formats, as necessary to provide long-term public access to the document.

SECTION 7. UNIFORMITY OF STANDARDS.

- (a) This [act] must be applied and construed to promote uniformity of the law with respect to its subject matter among the states that enact it.

(b) In implementing the requirements of this [act], the official publisher must consider:

- (1) standards and practices of other jurisdictions,
- (2) any standards on authentication and preservation of documents adopted by national standard-setting bodies, and
- (3) the needs of electronic document users.

SECTION 8. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal signatures in Global and National Commerce Act (15 U.S.C. Section 7001, et seq.) but does not modify, limit or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).

[Note: Not sure we need this language; need to consult with Pat Fry]

SECTION 9. EFFECTIVE DATE. This [act] takes effect [date].

Alternative Version:

SECTION 3. APPLICABILITY.

This [act] applies to an electronic document that is published on the internet.

SECTION 4. OFFICIAL VERSION.

- (a) If the electronic document is the only version of the document readily accessible to the public, it must be designated official and meet the requirements of sections 5 and 7.
- (b) If the official publisher continues to provide a print version of the electronic document, the official publisher may designate the electronic version as official, and must then meet the requirements of sections 5 and 7.
- (c) If the official publisher continues to provide a print version of the electronic document, and designates only the print version as official, the electronic version must at a minimum be clearly identified as unofficial upon entry to the web site.
[In addition, the web site must contain an explanation of an alternative procedure for the public to obtain a certified copy of the official version of the document.]

SECTION 5. AUTHENTICATION OF ELECTRONIC DOCUMENTS.

The official publisher of an electronic document which meets the criteria in section 4

- (a) or (b) must authenticate it....

...

SECTION 7. PRESERVATION AND PERMANENT ACCESS.

The official publisher of an electronic document which meets the criterial in section 4

(a) or (b) must establish a plan...