

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:

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 the 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.

- 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.

Attachment: Study Committee Draft of a Uniform Authentication of Online State Legal Materials Act, dated April 30, 2009.