

**Uniform Authentication and Preservation of State Electronic Legal Materials Act  
Issues Memorandum**

February 25-27, 2011 Drafting Committee Meeting

In the December 3, 2010, *Report of Drafting Committee Progress*, four main policy issues were identified as remaining for further discussion at the final drafting meeting in February. This memorandum will provide additional context for each of those issues.

1. Authentication. At the November, 2010, drafting meeting, both the policy and the wording of section 4 were discussed, and were the subject of two drafting committee motions and votes. Based on those drafting committee actions, section 4 currently reads:

**SECTION 4. AUTHENTICATION OF ELECTRONIC LEGAL MATERIAL** The official publisher of legal material in an electronic record that is designated official under section 3 shall authenticate the record by providing a method for users to determine that the electronic record is unaltered from the one published by the official publisher.

Since the last drafting meeting, the chair has received several requests, from both committee members and observers, to revisit the authentication policy and language at our final drafting meeting. In an effort to facilitate the discussion, the reporter and chair asked observers with technical expertise to suggest amended language. Mary Alice Baish from the American Association of Law Libraries thought that the original concept of “certification” was still useful. In addition, she met with observer Paul Doyle, and emailed the following language:

The official publisher of legal material in an electronic record that is designated official under section 3 shall authenticate the record by providing an electronic method for users to determine that the electronic record is unaltered from the one published by the official publisher.

Mike Wash, who was unable to attend on Saturday, November 20, 2010, emailed similar language:

The official publisher of legal material in an electronic record that is designated official under section 3 shall authenticate the record by providing a method for users to automatically determine that the electronic record is unaltered from the one published by the official publisher.

Both of these suggestions are similar to one made at the meeting by observer Phil Rosenthal, which was not adopted by the drafting committee. The main argument the chair heard against the concept was the potential cost of an electronic or automated method for an official publisher, which could impact enactability of the act. The counter-argument heard by the chair was that electronic authentication is an offsetting cost, for official publishers who want to save money by no longer

publishing books. Further, with the change made by the drafting committee to delete the concept of “certification”, section 4 would allow very low cost forms of electronic authentication such as the hash values now provided for the Utah administrative rules. Once the outcomes-based authentication requirement is in place in the act, proponents of adding the “electronic” or “automatic” concept to the act argue, the free market will develop affordable electronic methods of authentication.

2. Access. One of the comments received at the first reading in summer of 2010 was that free access to the authenticated electronic legal materials should be a requirement of the act. Based upon the comment, it appears that free access may be a key provision for enactability in some states. Based upon the discussion in the drafting committee, however, it appears that a requirement of free access would make enactability difficult in other states. Consequently, the chair and reporter suggested a bracketed provision in the draft for the November, 2010, meeting:

**SECTION 7. PUBLIC ACCESS TO ELECTRONIC LEGAL MATERIAL.** The official publisher of legal material in an electronic record shall ensure that the electronic legal material that is required to be preserved under Section 6 is reasonably available ~~{without charge}~~ on a permanent basis for use by the general public.

The drafting committee voted to delete the bracketed “without charge” on November 20, 2010. Shortly after the vote, our division chair Commissioner Jack Davies suggested that an alternative would be a new bracketed section 8 that would cover fees. Unfortunately, the time was up for the day, so the chair said we would discuss Commissioner Davies’ suggestion at the February, 2011, drafting meeting.

The chair and reporter have discussed adding a bracketed section that would require free access to the authenticated online legal materials, but would permit reasonable fees when the official publisher “adds value” to the materials. In a separate draft, the reporter has drafted suggested language for this potential new provision.

3. Title. On November 20, 2010, the chair met with ULC leadership to report on drafting committee progress and receive feedback from leadership. A member of the leadership team expressed concerns about the title of the act. Specifically, the chair heard comments that the title was too long, and that the term “legal materials” implied a broader scope than the “law” we were actually reaching. In addition, the person thought “law” would be a stronger term when it came to the enactment phase of the process.

*Issue A. Should the term “legal materials” be replaced with “law”?*

To facilitate this discussion, our reporter has prepared a draft in which the term “legal materials” is simply replaced with “law”. An obvious problem the committee would have to solve is to deal with the resulting circularity of a number of the definitions. Is there a third term that would be better than either of these two?

*Issue B. Should the terms “authentication” and “preservation” be removed from the title to shorten it?*

Examples: Uniform Electronic State Law Act  
Uniform State Electronic Legal Materials Act

*Issue C. If the answer to Issue B is “no”, should the title include the term “access”, to summarize all three of the act’s operative provisions? This point was made by several drafting committee members at the November meeting.*

Example: Uniform Authentication, Preservation, and Public Access to State Electronic Law (Legal Materials) Act

*Issue D. Should the title be left as is? The title was discussed at the March, 2010, meeting of the drafting committee, and the decision at that time was to leave the title as originally written.*

4. Uniform vs. Model Act. At the November 20, 2010 meeting with ULC leadership attended by the chair, the issue of whether the act should be designated uniform or model was raised. The issue was discussed by the drafting committee briefly on the afternoon of November 20<sup>th</sup>. The issue had been previously discussed at the March, 2010, drafting meeting, as well as by the earlier Study Committee. Although the discussion was brief on all three occasions, consensus was reached in each discussion to retain the designation of “uniform”. Some of the arguments the chair has heard include:

*Uniform*

- Section 5(b) addresses the impact of adoption of the act by other states; uniformity is therefore beneficial
- With the outcomes-based approach utilized in the act, uniform enactments are very possible
- If there are few enactments as a uniform act, the act can always be designated as “model”, but it is almost impossible to start as “model” and change later to “uniform”
- Acts on similar topics such as the Uniform Electronic Transactions Act and the Uniform Real Property Electronic Recording Act have been drafted as uniform acts and been successful

*Model*

- If the act is designated as “model”, then a high standard for the technology can be described as the ideal or goal

- This act is one that may need tailoring to the situation of the particular state, and therefore the designation as “model” makes more sense