Uniform Authentication and Preservation of State Electronic Legal Materials Act
Issues Memorandum
Prepared for November 19-20, 2010 Drafting Committee Meeting

1. Relationship to commercial publishers. (T. 10-12) At the first reading, Commissioner McKay asked why we need the act, since commercial publishers already publish the law and display it online. The chair responded that the act requires the states to designate an official publisher for the defined legal materials, and the relationship to commercial publishers is left to contract law. Commissioner DeLiberato responded further that the commercial publishers typically have a disclaimer that the online text is not official, and the act moves us in the direction of getting the official legal material online. Do we need more discussion on this issue? For example, what about the situation in which states do not publish their legal materials at all, and simply designate the commercial publisher's version as official. This is very common with case law.

2. Suggestion to add examples of technology to the comment. (T. 13) Commissioner Foster suggested that we add examples of the technology to the comment. Would this be helpful, or does the committee think we may be dating the act if we put current examples in the comments?

3. Suggestion to amend section 2 (2) to include superseded material. (T. 13) Commissioner Foster suggested that we amend the definition of "legal material" to add, "…even if no longer in force, superseded, reversed, or overruled." This general issue was discussed in the March, 2010, drafting committee meeting, and the group decided to take similar language out. But, the issue keeps coming back up. If we want to be clear about retaining old legal materials, it may need to be stated in the black letter. Should we add something specific on this point, and, if so, does it make sense to do it by amending the definition of "legal material"?

4. Relationship to Uniform Electronic Transactions Act. (T. 14-18) Commissioner Gabriel asked why we needed this act when we already have UETA. Commissioner Chow responded by saying that the requirement of authentication is what is different in this act. The chair added that, because these primary law materials are so important, the act requires the extra step of authentication, if publication is only in electronic form or the electronic form is deemed official. *Since Commissioner Chow was on the drafting committee for UETA, the chair and reporter have asked Commissioner Chow to be prepared for further discussion on this issue.*

5. Suggestion to revise section 3 to be more clear about the print option. (T. 18) Commissioner Behr made this suggestion after the chair commented that there are really three basic scenarios – print only and is official, electronic only so it must be official, or both print and electronic exist, but electronic is designated official. Earlier drafts made this more clear, but at the March, 2010 meeting, the drafting

committee pared the section down to what was really necessary. *Reporter and chair suggestion is to leave the section as is, but add clarification of the role of print in the comment.*

6. Rules of evidence not affected. (T. 18-22) Commissioner Willis expressed a concern that the act would affect what courts would accept as evidence of the law in court proceedings. The chair responded that section 5 established a presumption that the electronic legal material was true and correct if authenticated in compliance with the act, but that we were not intending to affect rules of evidence or try to tell courts what to do. We do say that, both in the preface and the comment to section 5. Is that sufficient, or do we need to add something to the black letter?

7. Policy decision to remain technology-neutral and outcomes-based rather than attempt to set technology standards. (T. 23-28) Commissioner Bertani raised a concern about being technology-neutral, and expressed the opinion that the act should set some technology standards. In addition, she expressed the concern that some states, like California, would set a "gold standard", and then be disadvantaged as other states used lesser standards. The chair assured Commissioner Bertani that her concern would be discussed by the drafting committee. How should we address this concern?

8. Paper as a means of preservation. (T. 29) Commissioner Foster asked whether or not paper copies would be a form of preservation for electronic legal materials. The chair responded that it would be, and the Commissioner then suggested that be added to the comment. Does the committee agree to add this concept to the comment?

   This exchange may also raise an issue with the wording of Section 7. PUBLIC ACCESS TO ELECTRONIC LEGAL MATERIAL, the last sentence of which reads: "If the legal material is published only in an electronic record, the official publisher shall continue to publish it in an electronic record." Is the last sentence in Section 7 a "public access" provision or a "preservation" provision? Does this sentence conflict with the notion (above), raised by Commissioner Foster, that electronic legal materials might be preserved in a paper format?

9. Suggestion to rewrite the phrase in section 6 , "which may include periodic updating into new electronic formats as necessary." (T. 30-32) Commissioner Stieff made a number of form suggestions, most of which have been incorporated into the November, 2010 interim draft. He also suggested rewriting the above-quoted clause, and then Commissioner Ford suggested adding, "which among other things may include" in front of the clause. *The chair and reporter suggest no change to this provision, and have not changed the language in the November, 2010 interim draft.*

10. Applicability to old print materials scanned and displayed electronically. (T. 33-34) Commissioner Behr thought it would be good to clarify whether or not old print materials scanned and displayed electronically would be subject to the act. She said she thought the policy should be that there is no duty to display old print material electronically, but if she chose to do so, there might be duties arising under the act, and we should be clear about them. *Please see the suggested language for section 11 drafted by the reporter and chair to address this issue by clarifying the prospective applicability of the mandates in the act.*

11. Nexus with the Hague Conference standards. (T. 35) Commissioner Gabriel asked whether or not the act was coordinated with the Hague Conference project. *The chair and reporter asked ABA advisor Lucy Thomson to help us research this project and any standards arising from it, and be prepared for discussion at the November drafting meeting.*

12. Add the requirement of "free" or "without charge" to section 7 on public access. (T. 36-37, 40) Commissioner Barrett suggested that we should require free public access to electronic legal materials. The chair summarized the committee discussions on the subject, and said there would be more discussion at the November, 2010 drafting meeting. Commissioner Barrett later stepped to the microphone a second time to suggest the unannotated version of the statutes might be free, while the annotated version could be for a fee. *The chair and reporter have added [without charge] in brackets in the November, 2010 interim draft as a suggestion. This would allow states wishing to require free access to do so, but not force all states to adopt that requirement – and maybe help with enactability.*

13. Does the act require a state to designate more than one commercial publisher's product as official, if they meet the requirements of the act? (T. 37-40) Commissioner Flowers was concerned that the act would spur competition among commercial publishers, and require a state to recognize more than one as official. Commissioner DeLiberato responded that the act does not deal with competition among commercial publishers – if a state decided to designate the product of a particular commercial publisher as the official version, that would be under a contractual arrangement just like it is now. *The chair and reporter do not think a change of language is needed on this issue. (But, our discussion of issue #1 above may be relevant.)*

14. Effective date. (T. 41-43) Commissioner Clark raised concerns about ambiguity in the effective date provision. He pointed out that the comment said the act applies to legal material created after the effective date, but that is not what the black letter says. Commissioner McKay added that perhaps we need a savings and transitional clause. *Please see the suggested change to section 11 in the November, 2010 interim draft.*

15. Chain of Custody. After the first reading, the drafting committee met briefly. Lucy Thomson mentioned that she had a conversation with Mary Alice Baish of

AALL about adding the concept of "chain of custody" into section 6. The chair said she would call Mary Alice to find out more detail, which she did. Mary Alice said that both Mike Wash from the GPO and Rick Fought from Arkansas had talked about the need to show the chain of custody of a document. Mary Alice noted that GPO is a 3rd party publisher of government documents, and the official publisher we are requiring would be a direct document creator and publisher, so perhaps the concept is not as important in the act. In any event, Mary Alice Baish will be attending the November, 2010, drafting meeting, so we can discuss this issue further. We referenced "chain of custody" in earlier drafts of the act, but took it out during the March, 2010, drafting meeting after we adopted the outcomes-based approach to technology. What should we do with this issue?