

To: Uniform Law Commissioners

From: Michele L. Timmons, Chair
Barbara A. Bintliff, Reporter

Date: June 1, 2010

Re: **Authentication and Preservation of State Electronic Legal Materials Act**
Issues for First Reading

The Drafting Committee for the Authentication and Preservation of State Electronic Legal Materials Act met once through a conference call held on October 29, 2009, and once in person from March 5-7, 2010, in Chicago. The conference call was largely organizational, with a review of the study committee report, and brainstorming about additional observers, but did include a discussion about the title of the act. The remaining substantive issues addressed in this memorandum were discussed during the March, 2010, drafting meeting.

1. Title of the Act. The group discussed the title of the act, and reviewed numerous alternative titles, with the objective of trying to find a shorter, catchier title that still expressed the subject covered by the act. Ultimately, the group decided not to propose a title different from the one originally drafted by the Executive and Scope and Program Committees, at least until after first reading by the full conference. “Authentication” and “Preservation” are key elements required by the act, so consensus was to retain the terms in the title. The current scope is “State” level documents with the force and effect of law, so that term has meaning. The term “Electronic” is essential to convey the meaning of the act, and the group felt it was preferable to “online” or “digital”. The phrase “Legal Materials” garnered slightly less consensus than the other terms in the title, but several members felt the shorter term “law” might not so easily convey the intent to include case law and administrative rules within the scope of the act.
2. Scope of the Act. During the study committee process, several members thought that county or city level legal materials should be considered for inclusion within the scope of this act. That issue was discussed by the drafting committee at the 2010 meeting, and consensus was quickly reached to concur with the decisions of the Executive and Scope and Program Committees to limit the act to state level legal materials. Because the process of electronic authentication is a relatively new concept, and may incur a cost to implement, the group thought it appropriate to begin with the most important state level legal materials. In order to give states flexibility, however, there are a number of bracketed provisions to allow states to cover a greater range of state level legal materials than those required to be covered.

3. Role of the Official Publisher. Initially, the group discussed whether or not the act should require commercial publishers of official state legal materials to take actions, and fairly quickly reached consensus that the act should leave the relationship between the official state publisher and a commercial publisher to a matter of contract law, as it is now. The discussion led to the idea that this act should require the designation of an official publisher for each type of state level legal material. The draft of the act prepared for first reading provides for the designation of an official state publisher for each type of legal material covered in the definitions section, and it is the “official publisher” who must comply with the act.
4. Applicability. The act applies to the defined “legal materials” if they are only published electronically, or if they are published both electronically and in print form, and the electronic form is designated official.
5. Outcomes-based Authentication Technology. The 2010 drafting meeting began with a demonstration of the document authentication technology being used by the United States Government Printing Office. Following the demonstration, a discussion about different methods of achieving authentication followed, and a strong consensus reached that the act should be technology neutral, and not promote a particular technology or vendor. In order to achieve this result, several of the technological observers suggested that the act express the desired outcomes of the technology, and leave the method of achieving the outcomes to the states. Thus, the act provides that the official publisher of the legal materials subject to the act certify that the electronic record is a true and correct copy of the legal material, similar to providing a certified copy of legal material in print form. In order to accomplish this, the official publisher must provide a method for the user to determine that the electronic record is unaltered from the one published by the official publisher, and sufficient information to determine that the certificate is valid.
6. Outcomes-based Preservation Technology. Following the authentication discussion, the drafting committee reached consensus to also use an outcomes-based approach for the requirements that electronic legal material be preserved and usable into the future. The group had more difficulty reaching the right balance as to exactly what legal material must be preserved. The concept of requiring all “versions” to be preserved seemed too broad, possibly requiring each iteration of a law moving through the legislative process to be preserved, for example. If the legal material had the force and effect of law at some point in time, however, most committee members believe it should be preserved. The current draft of the act requires “all published legal material” to be preserved, but this issue would benefit from floor discussion..
7. Public Access. The drafting committee also discussed the standards for public access to electronic legal material. While the American Association of Law Libraries suggested language requiring “continuing, permanent access”, several

committee members thought “continuing” access was an unrealistic standard, since web sites are not continuously accessible, but require periodic downtime for maintenance. The current draft uses the language “reasonably available on a permanent basis” to express the desired standard for access, but this issue would also benefit from floor discussion.