

D R A F T

FOR APPROVAL

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTIETH YEAR
VAIL, COLORADO
JULY 7 - JULY 13, 2011

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

WITH PREFATORY NOTE AND COMMENTS

Copyright ©2011

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

May 24, 2011

DRAFTING COMMITTEE FOR UNIFORM ELECTRONIC LEGAL MATERIAL ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

MICHELE L. TIMMONS, Office of the Revisor of Statutes, 700 State Office Bldg., 100 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155, *Chair*

JERRY L. BASSETT, Legislative Reference Service, 613 Alabama State House, 11 S. Union St., Montgomery, AL 36130

DAVID D. BIKLEN, 153 N. Beacon St., Hartford, CT 06105

DIANE F. BOYER-VINE, Office of Legislative Counsel, State Capitol, Room 3021, Sacramento, CA 95814-4996

STEPHEN Y. CHOW, 125 Summer St., Boston, MA 02110-1624

VINCENT C. DeLIBERATO, Jr., Legislative Reference Bureau, Main Capitol Bldg., Room 641, Harrisburg, PA 17120-0033

GENE H. HENNIG, 500 IDS Center, 80 S. 8th St., Minneapolis, MN 55402-3796

STEVEN L. WILLBORN, University of Nebraska College of Law, Ross McCollum Hall, 42 & Fair St., P.O. Box 830902, Lincoln, NE 68583-0902

BARBARA A. BINTLIFF, University of Texas School of Law, 727 E. Dean Keeton St., Austin, TX 78705, *Reporter*

EX OFFICIO

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Ave. S., Minneapolis, MN 55455, *President*

JACK DAVIES, 1201 Yale Pl., Unit 2004, Minneapolis, MN 55403-1961, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

LUCY THOMSON, 915 N. Quaker Dr., Alexandria, VA 22302, *ABA Advisor*

PHYLLIS B. PICKETT, 401 Legislative Office Bldg., 300 N. Salisbury St., Raleigh, NC 27603, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

TABLE OF CONTENTS

Prefatory Note.....	1
SECTION 1. SHORT TITLE	4
SECTION 2. DEFINITIONS.....	4
SECTION 3. APPLICABILITY.....	7
SECTION 4. LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD.....	7
SECTION 5. AUTHENTICATION OF OFFICIAL ELECTRONIC RECORD	8
SECTION 6. EFFECT OF AUTHENTICATION.....	10
SECTION 7. PRESERVATION OF LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD	10
SECTION 8. PUBLIC ACCESS TO LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD	12
SECTION 9. STANDARDS.....	13
SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	14
SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT	14
SECTION 12. EFFECTIVE DATE.....	14

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

Prefatory Note

Introduction. Providing information online is integral to the conduct of state government in the 21st century. The ease and speed with which information can be created, updated, and distributed electronically, especially in contrast to the time required for the production of print materials, enables governments to meet their obligations to provide legal information to the public in a timely and cost-effective manner. State governments have moved rapidly to the online distribution of legal information, in some instances designating a publication in electronic format to be an official publication. Some state governments are eliminating certain print publications altogether. The availability of government information online facilitates transparency and accountability, provides widespread access, and encourages citizen participation in the democratic process.

Changing to an electronic environment also raises new issues in information management. Electronic legal information moves from its originating computer through a series of other computers or servers until it eventually reaches the individual. The information is susceptible to being altered, whether accidentally or maliciously, at each point where it is stored, transferred, or accessed. Any such alterations can be virtually undetectable by the consumer. A major issue raised by the change to an electronic format, therefore, is whether the information presented to consumers is trustworthy, or authentic.

“An authentic text is one whose content has been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator.” (American Association of Law Libraries, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 8 (2007)). In the context of this act, the content originator is the official publisher. When a document is authentic, it means that the version of the legal resource presented to the user is the same as that approved by the lawmakers. A chain of custody has been established for that document that ensures its integrity, demonstrating that the information has not been tampered with or altering during the transfer between the official publisher and the end-user. Few state governments have taken the actions necessary to ensure that the electronic legal information they create and distribute remains unaltered and is, therefore, trustworthy or authentic.

Authenticity is a much larger concern in the electronic age than in the print age, where legal information typically exists in multiple copies, the content of which is “fixed” once printed, making the text easily verifiable and changes readily detectible. Print copies of legal material are routinely certified by state officials, and the certification assures the user of the trustworthiness of the document. It stands to reason, therefore, that before state governments can transition fully into the electronic legal information environment they must develop procedures to ensure the trustworthiness of their electronic legal information.

The ease with which electronic legal information is created and changed raises a second critical consideration: how is legal information with long-term, historical value (including, for example, amended statutes, repealed sections of regulations, and overruled cases) preserved for

future use? In a print environment, information is preserved by maintaining paper copies of key legislative documents, administrative materials, and judicial decisions and other resources. It is typical for more than one library, archive, or institution to keep a copy of these historical documents, further insuring their preservation.

Electronic information resides, however, on a computer or other storage device. New versions of computer hardware and software and changing storage media continually result in an inability to read or access older files, thereby making their content unavailable. As hardware, software, and storage media change, old documents are preserved by “migrating” to new formats. Electronic legal information of long-term value must be preserved in a usable format. Unfortunately, few states have addressed this critical need, and fewer still have an infrastructure in place to monitor older data and keep their storage methods up-to-date. The governmental and societal benefits of electronic creation and distribution are limited severely if state government information becomes unusable because of technological changes.

A third issue raised by the electronic creation and distribution of legal material flows from the necessity of preserving all forms of documents with long-term value: the issue is the responsibility of state government to make its legal resources easily, and permanently, accessible. Legal information is consulted by citizens, legislators, government administrators and officials, judges, attorneys, researchers, and scholars, all of whom may require access to both the current law and to older materials, including that which has been amended and superseded. Once properly preserved, electronic legal information of long-term value must also be easily accessible on the same basis as other legal information; that is, electronic legal information should be authenticated and widely available on a permanent basis. State governments must ensure an informed citizenry, which is essential for our democracy to function.

The issues that arise as state governments transition to an electronic legal information environment are common to every state. These issues are also encountered by subdivisions of state government, including municipalities and counties, as well as American Indian tribes. These governments face the same issues as the larger state government, and likewise must manage the entire life cycle of government information, from creation and publication to preservation. This act can be adapted for use by any governmental entity.

About the act.

The Uniform Electronic Legal Material Act (UELMA) provides states with an outcomes-based approach to the authentication and preservation of electronic legal material. That is, the goals of the authentication and preservation program outlined in the act are to enable end-users to verify the trustworthiness of the legal material they are using and to provide a framework for states to preserve legal material in perpetuity in a manner that allows for permanent access.

The act does not require specific technologies, leaving the choice of technology for authentication and preservation up to the states. Giving states the flexibility to choose any technology that meets the required outcomes allows each state to choose the best and most cost-effective method for their state. In addition, this flexible, outcomes-based approach anticipates that technologies will change over time; the act does not tie a state to any specific technology at

any time.

It should be noted that there are some important issues this act does not address, leaving them to other law or policy. First, this act does not mandate that states publish legal material electronically; choice of format is left entirely to a state's discretion. Second, this act does not deal with copyright issues, leaving those to federal law and state practice. Third, this act does not affect or supersede any rules of evidence; it only provides that electronic legal material that is authenticated is presumed to be a true copy.

Fourth, this act does not interfere with the contractual relationship between a state and a commercial publisher with which the state contracts for the production of its legal material. The act requires that the official publisher be responsible for implementing the terms of the act, regardless of where or by whom the legal material is actually printed or distributed. For the purposes of the act, only a state agency, officer, or employee can be the official publisher, although state policy may allow a commercial entity to produce an official version of the state's legal material.

Conclusion. The use of digital information formats has become fundamental and indispensable to the operation of state government. This act addresses the critical need to manage electronic legal information in a manner that guarantees the trustworthiness of and continuing access to important state legal material. Technology changes quickly enough that state governments must address this issue, as existing electronic legal information is already in danger of being lost. A uniform act will allow state governments to develop similar systems of authentication and preservation, aiding the free flow of information across state lines and the sharing of experiences and expertise to keep costs as low as possible.

A uniform act should set forth provisions that can be efficiently followed and that achieve the stated purposes of the act. The Drafting Committee believes that this proposed uniform act meets these requirements. The act is straightforward in its terms, creates no additional administrative offices, and has no requirement of judicial or administrative oversight. The act was developed through extensive discussion and debate during five meetings of the Drafting Committee.

The Drafting Committee was assisted by numerous advisors and observers, representing a wide range of organizations. In addition to the American Bar Association advisor(s) listed above, important contributions were made by the observers who attended meetings, participated in conference calls, and submitted many comments on and suggestions for the various drafts of the act. The act is better for their contributions.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Legal Material Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) “Legal material” means:

- (A) the [Constitution of this state];
- (B) [legislative enactments] enacted by the [Legislature];
- (C) [name of state code]; [and]
- (D) a state agency rule that has the effect of law[;] [and]
- [(E) a state administrative agency decision that has precedential effect][;] [and]
- [(F) a state court decision that has precedential effect][;] [and]
- [(G) state court rules]].

(3) “Official publisher” means:

- (A) for [the Constitution of this state], the [insert appropriate agency or official];
- (B) for [legislative enactments] enacted by the [Legislature], the [insert appropriate agency or official];
- (C) for [name of state code], the [insert appropriate agency or official]; [and]
- (D) for a rule published in the [insert name of administrative code], the [insert appropriate agency or official][;] [and]
- [(E) for a rule not published in the [insert name of administrative code], the state

1 agency adopting the rule][;] [and]

2 [(F) for a state administrative agency decision that has precedential effect, the

3 [insert appropriate agency or official][;] [and]

4 [(G) for a state court decision that has precedential effect, the [insert appropriate

5 agency or official][;] [and]

6 [(H) for state court rules, the [insert appropriate agency or official].

7 (4) “Publish” means to display, present, or release to the public.

8 (5) “Record” means information that is inscribed on a tangible medium or that is stored in

9 an electronic or other medium and is retrievable in perceivable form.

10 (6) “State” means a state of the United States, the District of Columbia, Puerto Rico, the

11 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of

12 the United States.

13 **Legislative Note:** *With regard to Section 2(2), drafters will need to insert, in the place indicated*
14 *by bracketed language, the proper name or title for several types of state legal material*
15 *including the state constitution, session laws, statutory code, and administrative code, as well as*
16 *the proper name or title of other legal material, provided as alternatives, the enacting state*
17 *chooses to include in the act’s coverage.*

18

19 *If additional legal material is added, each type should be identified by its proper name or*
20 *title and given its own subparagraph. If additional legal material is added to Section 2(2), a*
21 *corresponding addition must be made to Section 2(3).*

22

23 *With regard to Section 2(3), drafters will need to insert, in the place indicated by*
24 *bracketed language, the proper name or title for several types of state legal material, including*
25 *the state constitution, statutory code, session laws, and administrative code, as well as the*
26 *proper name or title of any other publications the enacting state includes in the act’s coverage.*
27 *The name of the legal material inserted in place of the bracketed language must correspond*
28 *exactly with the name in the corresponding definition of legal material in Section 2(2).*

29

30 *Drafters will need to insert, in the place indicated by bracketed language, the proper*
31 *name of the agency or state officer or employee designated as the official publisher.*

32

33 *With regard to Section 2(3)(H), drafters may need to make distinctions between courts,*
34 *including courts of final resort, appellate level courts, and trial courts (including different types*

1 *and levels of trial courts), depending on how court rules are promulgated or approved in the*
2 *enacting state.*

3
4 **Comment**

5 Several definitions used in this act are standard in Conference acts, including
6 “electronic,” “record,” and “state.” These words, so defined, have been used in other acts
7 promulgated by the Conference, including notably the Uniform Electronic Transactions Act
8 (UETA),¹ which has been adopted by 47 states, the District of Columbia, and the Virgin Islands
9 as of March 2011. The use of these terms in the same manner in several acts leads to a
10 consistency within the laws of each state adopting the several acts, in addition to the sought-after
11 uniformity among states.

12
13 **Legal material.** (Section 2(2)). The definition of “legal material” is intentionally
14 narrow. As drafted, it includes only the most basic state-level legal documents: the state
15 constitution, session laws, codified laws, and administrative rules with the force of law. The act
16 suggests as alternatives a range of additional legal material.

17
18 Among the additional legal material suggested for inclusion is state administrative
19 agency decisions with precedential effect. An enacting state may choose to include or exclude
20 certain agency decisions in the act’s coverage, in which situation the decisions should be listed
21 with specificity.

22
23 In some states, the publication of judicial decisions and court rules is handled by the
24 judicial branch, over which the state legislature may have no authority to mandate specific
25 procedures such as those created by this act. Because of this potential separation of powers
26 issue, judicial decisions and court rules are included in this act as an alternative in the definition
27 of legal material. If an enacting state includes judicial decisions or court rules, some
28 differentiation between legal material issued by the state’s various courts (i.e. trial courts of
29 various types, appellate courts, and supreme court) may be necessary.

30
31 Enacting states may decide to expand the definition of legal material beyond that offered
32 as alternatives. Many important sources of law, such as legislative journals and calendars,
33 reports of legislative confirmations and other hearings, versions of bills, gubernatorial orders and
34 proclamations, attorney general opinions, and many agency publications, could be included in
35 the act’s coverage. Whether a state legislature can include in the act the records from certain
36 executive branch officials (executive orders and proclamations, or attorney general opinions, for
37 example) raises a separation of powers issue similar to that regarding judicial decisions. If
38 additional legal material is added to Section 2(2), a corresponding addition must be made to
39 Section 2(3) that identifies an official publisher for the legal material.

40
41 **Official publisher.** (Section 2(3)). The state must designate an official publisher for
42 each type of legal material defined in Section 2(2). This can, and most likely will, be an existing
43 state agency, officer, or employee that already has responsibility for the publication of the legal

¹ The definition of “state” in UETA includes a second sentence regarding Indian tribes and Alaskan villages that is not part of this act’s definition.

1 material. The official publisher is the state actor charged with carrying out the provisions of this
2 act.

3
4 To complete the definition of official publisher, an appropriate government agency or
5 employee for each type of legal material must be identified, as indicated by bracketed language.
6 Because the legal material may come from different departments, and even different branches, of
7 government, the official publisher may be one employee or agency, or several.

8
9 This act only applies to legal material published by the official publisher designated in
10 this Section. Many states contract with commercial printers or publishers for the production of
11 their legal material, and under this act states can continue to contract out the production of their
12 legal material as desired. The act does not interfere with the contractual relationship between the
13 state and the commercial publisher. However, a commercial publisher cannot serve as official
14 publisher of legal material for the purposes of this act.

15
16 **SECTION 3. APPLICABILITY.** This [act] applies to all legal material in an
17 electronic record that is designated as official under Section 4 and first published on or after the
18 effective date of the [act].

19 *Legislative Note: To include a preexisting publication in the coverage of the act, the following*
20 *changes should be made. First, the present language of Section 3 should become subsection (a).*
21 *A second subsection (b), as follows, should be added: (b) This[act] applies to the following legal*
22 *material in an official electronic record that was first published before [the effective date of this*
23 *act]:[insert proper name or title here].*

24
25 *If preexisting legal material is included in the act's coverage, drafters should include the*
26 *material in the definition of legal material in Section 2(2), and designate an official publisher for*
27 *the material in Section 2(3), as necessary.*

28 **Comment**

29
30
31 This act is intended to complement, and not affect, an enacting state's existing public
32 records or records management laws and practices, under which non-electronic legal material is
33 preserved. This act does not affect a state's responsibility to preserve non-electronic legal
34 material.

35 **SECTION 4. LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD.**

36
37 (a) If an official publisher publishes legal material only in an electronic record, the
38 publisher shall:

39 (1) designate the electronic record as official; and

1 (2) meet the requirements of Sections 5, 7, and 8.

2 (b) If an official publisher publishes legal material in a record other than an electronic
3 record, the publisher may designate an electronic record as official if the requirements of
4 Sections 5, 7, and 8 are met.

5 **Comment**

6
7 This act does not direct a state to publish its legal material in any specific format or
8 formats. The act leaves policy decisions regarding format of its legal material to the state.
9

10 For legal material published in both print and electronic formats, as is typical in many
11 states, the official publisher may choose to designate the electronic version as official. If
12 designated as official, the requirements of the act must be met. As a matter of courtesy to the
13 user of electronic legal material, if the electronic version is not designated as official, the state
14 should include information that displays with the legal material that explains the source of or the
15 procedure by which the public can obtain a copy of the official version of the legal material.
16

17 Where the legal material is published only in an electronic format, the official publisher
18 is required to designate as official the electronic format. This is a common sense requirement; if
19 legal material is available from the state government in one version only, it follows that that
20 version must be official.

21 **SECTION 5. AUTHENTICATION OF OFFICIAL ELECTRONIC RECORD.** An

22 official publisher of legal material in an electronic record that is designated as official under
23 Section 4 shall authenticate the record by providing a method for users to determine that the
24 record is unaltered from the one published by the publisher.
25

26 **Comment**

27 As matters of public policy, a state should make its official legal material available in a
28 trustworthy form and citizens should be able to ascertain the trustworthiness of electronic official
29 legal material. This act guides a state in implementing both policies. The intent of this act is to
30 be technology-neutral, leaving it to the enacting state to choose its preferred technology for
31 authentication of legal material in an electronic record from among the options available. The
32 technology-neutral approach also allows the state to change technologies when necessary or
33 desirable.
34

35 Authentication of electronic legal documents is an issue of both national and worldwide
36 concern. Numerous governments and organizations are beginning to authenticate legal material
37 and develop best practices. As of March, 2011, there are several U.S. jurisdictions in which

1 legal material in an electronic record is being authenticated. Their practice offers guidance on
2 specific technologies.

3
4 For example, the United States Government Printing Office is providing official,
5 authenticated Public Laws and other legal material using digital signatures (*see*
6 <http://www.gpoaccess.gov/authentication/faq.html#1>). Utah authenticates its administrative
7 code using hash values (*see* www.rules.utah.gov/publicat/code.html). Delaware provides an
8 authenticated electronic version of administrative rules using a digital signature (*see*,
9 <http://regulations.delaware.gov/AdminCode/>). Arkansas issues its opinions in an authenticated,
10 electronic format, also using digital signatures (*see*
11 http://courts.arkansas.gov/court_opinions/sc/2009a/20090528/published/09-540.pdf).
12

13 France’s electronic JOURNAL OFFICIEL, the official record of its legislation and
14 regulations, is authenticated (*see* <http://journal-officiel.gouv.fr/>). South Korea has announced,
15 as part of its transition to a more electronic environment, that it will improve its practices so that
16 “digital documents are considered as valid as their printed versions”.
17 (<http://www.koreaherald.com/business/Detail.jsp?newsMLId=20101205000243>).
18

19 The Hague Conference on Private International Law, a 72-member inter-governmental
20 organization that develops multilateral legal instruments, has developed a best practices
21 document requiring authentication of its official electronic legal materials. The “Guiding
22 Principles to be Considered in Developing a Future Instrument,” begun in 2008, includes
23 principles for Integrity and Authoritativeness that state, in part:
24

- 25 4. State Parties are encouraged to make available authoritative versions of their legal
26 materials provided in electronic form.
27 5. State Parties are encouraged to take all reasonable measures available to them to
28 ensure that authoritative legal materials can be reproduced or re-used by other bodies
29 with clear indications of their origins and integrity (authoritativeness).
30

31 These Principles, when completed and adopted, will apply to the development of all
32 instruments coming from the Hague Conference, and the principles will become standards for
33 organizations and jurisdictions worldwide. This act adds to these emerging standards by
34 approaching the issue from an outcomes-based perspective.
35

36 As shown in the examples above, products that are cost-effective, convenient, and
37 immediate in outcome are already available for electronic authentication of legal material. As
38 authentication of electronic information becomes standard, more products for and methods of
39 authentication will be developed. In order to allow states maximum flexibility, the act does not
40 specify any particular technologies or methods of authentication.
41

42 Regardless of the method of authentication, it is important that official publishers
43 designate a “baseline” copy of all published legal material that constitutes the definitive
44 document against which all others are compared for the purpose of authenticating the legal
45 material. The format of the baseline copy may vary, depending on the practices of the official
46 publisher and the type of legal material. The baseline copy will ensure that the legal material

1 required to be preserved under Section 7, and to which public access is made available in Section
2 8, is accurate and trustworthy.

3
4 **SECTION 6. EFFECT OF AUTHENTICATION.**

5 (a) Legal material in an electronic record that is authenticated under Section 5 is
6 presumed to be an accurate copy of the legal material.

7 (b) If another state has adopted an act substantially similar to this [act], legal material in
8 an electronic record designated as official and authenticated by that state is presumed to be an
9 accurate copy of that legal material.

10 **Comment**

11 The intent of this act is to provide the end-user of electronic legal material with a
12 presumption that authenticated legal material is accurate. It extends the same presumption to
13 authenticated electronic legal material that is created by publication in a book, and results in the
14 same shift in the burden of proof. The act does not affect or supersede any rules of evidence, and
15 leaves further evidentiary effect to existing state law and court rules. The presumption that
16 authenticated electronic legal material is an accurate copy is not determinative of any criteria a
17 court may wish to establish regarding admissibility and reliability of electronic legal material.
18 Beyond any steps necessary to authenticate electronic information as required by Section 5, no
19 burden is imposed on courts, lawyers, or other users.

20
21 The act does not require electronic legal material from another state to be authenticated
22 for use in the enacting state. However, if another state has adopted this act, the same
23 presumption of accuracy applies to its authenticated electronic legal material. Widespread
24 adoption of this act will further the recognition and use of electronic legal material.

25
26 **SECTION 7. PRESERVATION OF LEGAL MATERIAL IN OFFICIAL**
27 **ELECTRONIC RECORD.**

28 (a) An official publisher of legal material in an electronic record that is or was designated
29 as official under Section 4 shall provide for the preservation of the record in an electronic form
30 or a form that is not electronic.

31 (b) If legal material is preserved in an electronic record, the official publisher shall:

32 (1) ensure the integrity of the record;

1 (2) provide for backup and disaster recovery of the record; and

2 (3) ensure the continuing usability of the material.

3 **Comment**

4
5 Legal material retains its value regardless of whether it is currently in effect. This
6 includes legal material that is subsequently amended or repealed, as happens with statutes, as
7 well as legal material such as cases that may be reversed or overruled. For example, the outcome
8 of today’s lawsuit may depend on rights or obligations created by yesterday’s statutes or
9 regulations. Researchers need historical as well as current legal material to understand the
10 development of legal doctrine and its future course. Legal material must be saved and
11 protected—preserved—to allow for future use.
12

13 The best practices document of the Hague Conference on Private International Law,
14 “Guiding Principles to be Considered in Developing a Future Instrument,” delegates to each state
15 the responsibility for preserving its legal material. The Guiding Principles document states that:
16 “7. State Parties are encouraged to ensure long-term preservation and accessibility of their legal
17 materials . . .”.
18

19 Enacting states are given discretion to decide what electronic legal material must be
20 preserved. This is done through the definition of legal material in Section 2. This section
21 requires that any legal material included in the Section 2 definitions must be preserved. The
22 preservation requirement is intended to cover all materials typically published with the defined
23 legal material. For example, state session laws usually include lists of legislators and state
24 officials, memorials, proposed or final state constitution amendments, and resolutions, all of
25 which should be preserved along with the legislative enactments.
26

27 This act requires that the official publisher of legal material preserve the record using
28 methods determined by the state. The record might be preserved electronically or in print or
29 other tangible format, depending on the state’s policy. If preserved in print or other tangible
30 format, the years of experience all states already have in dealing with tangible records should
31 allow for appropriate preservation. Regardless of the method chosen for preserving legal
32 material, the official publisher’s practices should be carried out in accordance with existing
33 public records and records management laws.
34

35 If legal material is preserved electronically, the act requires certain conditions. Electronic
36 records must be securely stored to ensure their integrity. Best practices for secure storage call
37 for the maintenance of multiple copies of electronic records that are geographically and
38 administratively separated. The existence of multiple copies maximizes the availability of at
39 least one copy of important records, even after a natural disaster or other emergency. Keeping
40 multiple copies enables recovery from a disaster that destroys or corrupts one of the copies. Two
41 or three copies of electronic records are generally considered adequate for this purpose and will
42 also allow for the authentication of the preserved legal material.
43

1 Legal material is often complex in organization and presentation. The formatting of the
2 content of the legal material, including italicization, indentation, numbering, bold face fonts, and
3 internal subdivisions and subsections, can be significant. Hierarchies are defined and priorities
4 are established, for example, by formatting, and legislative intent is made clear. The official
5 publisher should preserve the legally significant formatting of electronic legal material to ensure
6 that both the content and the organization are available in the future.

7
8 The electronic records must be backed-up periodically to maintain their safety. The
9 back-up may be incremental, essentially tracking all changes to the original, or a continuous
10 backing up of the entire system that saves the complete text of each version, among other
11 methods. Whatever method the state chooses must back-up the original material plus subsequent
12 changes; a changed record becomes a new record with content that must also be backed-up.
13 Legal material is continually updated; states must develop systems that recognize the dynamic
14 nature of legal material and provide for appropriate preservation.

15
16 Preservation requires that the electronic records be migrated to new storage media from
17 time to time. Just as cassette tapes were replaced by CD-ROMs which were then replaced by
18 digital music formats, storage media for electronic records has and will continue to change over
19 time. While the nature of new technologies is not known at the present time, the fact that new
20 technologies will be developed is a certainty. Costs of storage media are decreasing rapidly as
21 the marketplace produces new products and methods. The anticipation of the Drafting
22 Committee is that preservation of electronic records will be cost neutral when compared with the
23 current system of storing tangible legal material.

24
25 The act does not impose a duty to convert non-electronic legal material retrospectively to
26 an electronic format. Choice of format is entirely up to the state. If, however, the official
27 publisher chooses to digitize non-electronic legal material and designate that material as official,
28 the requirements of the act must be met.

29
30 **SECTION 8. PUBLIC ACCESS TO LEGAL MATERIAL IN OFFICIAL**

31 **ELECTRONIC RECORD.** An official publisher of legal material in an electronic record that
32 must be preserved under Section 7 shall ensure that the material is reasonably available for use
33 by the public on a permanent basis.

34 **Comment**

35 Our democratic system of government depends on an informed citizenry. Legal material
36 includes information essential to all citizens in a democracy, whether the legal material is
37 effective currently, has been repealed or overruled, or is of historical value only. To exercise
38 their rights to participate in our democracy, citizens must have reasonable access to all legal
39 material.

1 This section highlights the importance to the citizenry of legal material by requiring
2 permanent public access to electronic legal material. Permanent public access to official
3 electronic legal material allows citizens to stay informed of legal developments and carry out
4 their democratic responsibilities. Any legal material in an electronic record designated as official
5 under Section 4 of this act must be preserved under Section 7. All legal material required to be
6 preserved under Section 7 of the act must be publicly accessible under this Section.

7
8 Legal material preserved under this act must be “reasonably available” to the general
9 public. Reasonable availability does not necessarily mean that the information must be accessible
10 around the clock, every day of the year. An enacting state has discretion to decide what is
11 reasonable, which should be determined in a manner consistent with other state practice.
12 Providing public access to state records is routinely done by state archives, whose practices may
13 provide important guidance to official publishers. Reasonable availability may mean that the
14 legal material can be used during business hours at publicly accessible locations, such as
15 designated state offices, public libraries, a state repository or archive, or similar location.

16
17 Access to preserved electronic legal material may be limited by the state’s determination
18 of reasonableness, but access must be offered permanently. That is, the preserved electronic
19 legal material must remain available in perpetuity. This requirement makes electronic legal
20 material comparable to print legal material, which is stored on a permanent basis in libraries,
21 archives, and offices.

22
23 The Hague Conference’s “Guiding Principles to be Considered in Developing a Future
24 Instrument” state that “2. State Parties are also encouraged to make available for free access
25 relevant historical materials . . .”. In order to provide for maximum flexibility, and recognizing
26 economic realities, however, the act does not address the issue of cost for access to electronic
27 legal material. The result is that providing free access or charging reasonable fees for access to
28 electronic legal material is a decision left up to the states.

29
30 **SECTION 9. STANDARDS.** In implementing this [act], an official publisher of legal
31 material shall consider:

32 (1) standards and practices of other jurisdictions;

33 (2) the most recent standards regarding preservation of, authentication of, and public
34 access to legal material in an electronic record and other electronic records, as promulgated by
35 national standard-setting bodies;

36 (3) the needs of users of legal material in an electronic record; and

37 (4) the views of governmental officials and entities and other interested persons.

38 **Comment**

1
2 The language of this section, based on a similar provision in the Uniform Real Property
3 Electronic Recording Act, requires consideration of standards and best practices for the
4 authentication, preservation, and permanent access of electronic records. As private sector
5 organizations, government agencies, and international organizations tackle these issues, their
6 work may offer guidance to states as this act is implemented on an on-going basis. Like many
7 other technology-related procedures, standards and best practices for authentication,
8 preservation, and permanent access of electronic records are in a state of development and
9 refinement. For example, appropriate information security is a key element of the authentication
10 process, and security standards are currently being developed. The state’s own standards should
11 include a method to evaluate the effectiveness of the official publisher’s implementation of this
12 act.

13
14 While each enacting state will determine its own practices, states are encouraged to
15 communicate, coordinate, and collaborate in the development of authentication, preservation,
16 and permanent access standards.

17
18 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
19 applying and construing this uniform act, consideration must be given to the need to promote
20 uniformity of the law with respect to its subject matter among states that enact it.

21 **SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
22 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
23 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
24 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
25 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
26 Section 7003(b).

27 **SECTION 12. EFFECTIVE DATE.** This [act] takes effect

28 **Comment**

29 This act applies to legal material in an electronic record designated as official and first
30 published after the effective date of the act, as noted in section 3. Additional time may be
31 needed, beyond the usual date of effectiveness of its statutes, for a state to prepare policies and
32 procedures to meet the requirements of authentication, preservation and public access of
33 electronic legal material.