

Authentication and Preservation of State Electronic Legal Materials Act
March 5-7, 2010 Committee Meeting
Issues Memorandum – Outline for Meeting Discussion

A. What are the core substantive provisions of the act?

1) Begin with Section 4, beginning page 3, line 14

4(1) – After having seen the demonstration of the Government Printing Office authentication system, does this section accurately describe the steps required for authentication? Or, phrased differently, does the section describe the desired outcomes of authentication in a technology-neutral way?

4(2) – A comment was received asking for more clarity about what “a clear indicator of authenticity” is.

- Could be a certificate of authenticity, a seal such as the federal blue eagle, a watermark, a digital signature, or something else
- Would it be better to list specific examples of indicators, and use “or other clear indicator of authenticity” as a catch-all at the end of the sentence?

4(3) – A comment was received from a commercial publisher pointing out that the requirement of authentication would add cost to a contract. Consequently, the suggestion was made to make this requirement apply to contracts entered into after the effective date of the act. Does the group agree? It seems reasonable in terms of enactability, but would delay authentication in some cases.

Review related definition of “authenticate”, page 1, lines 7 and 8

- Comment received that definition does not parallel the requirements of section 4 as to the minimum standards for authentication. Do we need a definition, or can section 4 cover the whole subject?
- If we keep a definition, a commenter questioned the use of the phrase “unaltered from the version published by the official publisher”. Particularly for judicial opinions, commercial publishers often make corrections that are received unofficially from the court, so the version published by the commercial publisher would differ from the original published by the court.
- If we keep the definition, the use of “verify” was questioned. Do we mean something more or different from the requirements in section 4? This was raised by a commercial publisher, concerned about electronic transmission of documents from government agencies to them, which they in turn publish as official.

Review related definition of “chain of custody”, page 1, lines 9 and 10

- What do we mean by “chronological documentation”?
- The term “paper trail” may not be appropriate for a statute, and we probably don’t mean that literally. Is “audit trail” better?
- Does this mean that all steps of the process would need to be tracked (i.e., receipt, conversion, editing, etc. for each document), so the chain of custody could be certified? If so, what are the cost implications?

2) Section 5, page 4, lines 3 and 4 - A comment was received that the reader will be looking for a provision that allows them to rely safely on the official publisher’s version of the legal material, if it is authenticated. This provision was intended to do just that, unless there is some other credible evidence that the official, authenticated version is erroneous. Is that essentially what we want the policy choice to be? If so:

- Is the use of the “prima facie evidence” too legalistic?
- Should this concept be expressed in plainer English?

3) Section 9, page 5, lines 4 to 6 – This section was added to effectuate the “full faith and credit” concept discussed by the study committee. We should probably use parallel language to whatever is used for section 5.

4) Section 6 on Preservation, page 4, lines 5 -11

- A couple of people questioned whether the “original document creation” language would work. For example, there were specific concerns about the requirements in the context of the customary publishing process for judicial opinions. Judicial opinions are often corrected or modified by the court, or information in the opinion is redacted or expunged and new superceding opinions are not issued. The language as drafted would require the publisher to retain the incorrect original or original prior to redaction. (Are we looking to preserve the official version of the document?)
- The requirement for “periodic archiving” on page 4, line 9, was questioned. Is this necessary in light of the requirement to update as necessary to provide “permanent public access”?

Review related definition of “preservation”, page 2, lines 11 – 13

- Is this definition consistent with Section 6? (Do we need the definition?)
- If so, our style liaison suggested a specific language change to:

“Preservation” means the retention of the intellectual content of a document, either in its original publication form or as reformatted by the official publisher.

- But, she and another person questioned “intellectual content” phrase

5) Section 7 on Permanent Public Access, page 4, lines 12 - 18

- One comment asked if we are sure we want to include this requirement. Doesn't this add to the cost?
- Page 4, line 13, is the language “including the forms of the document” clear?
- Page 4, lines 15 and 16. One comment questioned whether the concept of “location” is needed here. Should that language be stricken?

Review related definition of “permanent public access”, page 2, line 6

- Do we want to define this term, or let section 7 stand alone?
- If so, concern raised that “preservation” and “permanent public access” definitions overlap a lot. (Study committee draft had concept of permanent public access in section 6 on preservation, but new definition and sections were written in response to concerns that critical goal of public access was not highlighted enough.)

B. To which documents should these core requirements apply?

1) Review definition of “documents”, Section 2 (3), page 1, lines 11 through 21

- A comment questioned whether “document” is the right word, and suggested “record”. Some legal materials may not be in document form – for example, legal materials prepared for visually-impaired persons might be oral. Another comment suggested using “legal materials” since that is what we reference in the title.
 - Would it be better to move the list of legal materials covered by the act to Section 3 on applicability?
 - If so, it might be possible to either delete the definition of document, or use “record” as defined in the Uniform Electronic Transactions Act:

“Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

- A comment questioned use of “primary” law materials, which we picked up from an earlier comment by one of the commercial publishers. If this is a term of art commonly used by legal publishers, but maybe not understood by the general reader, should we delete it? Also, a commenter suggested using “legal materials” here if that is what we use in the title.
- On line 13, comment received that “passed” may not be accurate, perhaps “enacted” is better to account for potential vetoes?
- Lines 16 & 18, a comment pointed out that “precedential effect” and “precedential value” should read the same
- Lines 17 and 18 – are bracketed because of the point that not all states can enact statutes that affect the judicial branch, because of separation of powers. Will the bracketing be sufficient if a comment explains why we have bracketed here?
- Lines 19 and 20 – Do we want to include local government legal materials, even bracketed? If so, one commenter thought it might be better in a different definition or section? (Also, we may need to add some parallel bracketed provisions, such as in defining “official publisher”)
- Line 21 – any policy problems with allowing states to add other items?
- Should we add a category for “executive branch documents of legal applicability or precedential value/effect”?

2) Section 3, alternatives 1 and 2, beginning page 2, line 19, to page 3, line 13

The original problem identified by the American Association of Law Libraries was that many states were doing away with print publications to save money, and publishing only on the internet, but not making provisions for authenticating the electronic legal materials, preserving them, and providing for permanent public access. In light of this, should the act apply to:

- a.) Legal materials published only electronically, where print has been discontinued,
- b.) Legal materials published electronically, but designated official versions, even if print exists,
- c.) Any electronic legal materials meeting the definition of document, or
- d.) Some other subset of publication methods?

We should think about the cost implications of the policy choice here.

- A secondary issue raised in a comment is whether or not publication on the “Internet” is too limiting, especially in light of the dynamically changing methods for electronic publication. Maybe “electronic” needs to be used here as the broader word.
- If policy choice is a. above, should we make it clear that printing a few paper copies as an archival or back-up mechanism is not a loophole to avoid the substantive requirements of the act?

Review related definition of “electronic”, page 1, lines 22 -23

- Definition taken from Electronic Real Property Recording Act
- Anybody see a reason to differ?

Review related definition of “electronic document”, page 1, lines 24 – 25

- Received comment questioning “readable online”
- UERPRA defines “electronic document” as “a document that is received by the [recorder] in an electronic form”. Should we craft something that is similar?

C. Who is required to implement these core requirements?

Review definition of “official”, page 2, line 1

- Suggestion from style liaison that perhaps we mean to refer to those documents identified as true and correct copies pursuant to state law
- But, would need to tweak if include local government law
- Or, another commenter suggested that the official version is the “ultimate reference” or “gold standard” version. He suggested adding a sentence: “The official version of a document is that version against which any other version of that document from any source would be measured for accuracy.”

Review definition of “official publisher”, page 2, lines 2- 5

- Style liaison suggested rewrite to:

“Official publisher” means an agency, department, board, commission, authority, institution, or instrumentality of state government that is authorized or required by law to publish one or more documents.
- Commercial publisher commented that not all states enter into a contract for publication of their documents. In some states, the state simply adopts the commercial publication as official. How do we address this situation?
- We should have a policy discussion about how to treat commercial publishers in the act.

Review definition of “publish”, page 2, line 11

- Style liaison suggests rewrite to:
“Publish means to produce or release for general public access.”
- Does this rewrite solve concern raised that a “release for general distribution” could include a press release, making copies on request, or transmitting via email to a subscribed list?

Do we need any more definitions?

- Suggestion to add “readily accessible”
- Suggestion to add “archive”, with proposed language:
“Archive” means to curate and preserve an object throughout its lifecycle. Archiving of a digital object includes creating appropriate metadata to establish the authenticity and provenance of the object, storing multiple copies of the object according to established preservation processes, and curating the object over time to ensure it has not changed. Archiving of print materials includes creation of sufficient metadata to show authenticity and provenance and permit discovery with an appropriate finding tool, and also includes the storage of the material according to established preservation processes with curation over the lifecycle of the material.

D. If there is time, do we want to discuss the title of the act again?