

D R A F T

FOR DISCUSSION ONLY

**AUTHENTICATION AND PRESERVATION OF STATE
ELECTRONIC LEGAL MATERIALS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
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**AUTHENTICATION AND PRESERVATION OF STATE
ELECTRONIC LEGAL MATERIALS ACT**

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE FOR AUTHENTICATION AND PRESERVATION OF
STATE ELECTRONIC LEGAL MATERIALS 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, 11S. 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 South Eighth 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 Colorado at Boulder, 424 Wolf Law Bldg., 401 UCB, Boulder, CO 80309-0401, *Reporter*

EX OFFICIO

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Ave. South, 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, North Carolina General Assembly, 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

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AUTHENTICATION AND PRESERVATION OF STATE ELECTRONIC LEGAL MATERIALS 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 declaring a publication in electronic format to be an official publication equivalent to a print version. 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 consumer. The information is susceptible to being altered, whether accidentally or maliciously, at each transfer. Any such alterations are virtually undetectable. A major issue raised by the change to an electronic environment, therefore, is whether the information consulted by 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.”¹ When a document is authentic, it means that the version of the legal resource seen by the user is the same version that was approved by the lawmakers. A chain of custody for that document has been established that ensures its integrity, establishing that the transfer between the official publisher and the end-user has not been tampered with. 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 an issue unknown 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

¹ American Association of Law Libraries, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 8 (2007).

future use? In a print environment, information is preserved by maintaining paper copies of key legislative documents, administrative materials, and judicial 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. New versions of computer hardware and software and changing storage media continually result in an inability to read or access older files, thereby losing their content. 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 its storage method 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 materials 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 the American Indian tribes. These governments face the same situation 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 Authentication and Preservation of State Electronic Legal Material Act provides states with an outcomes-oriented approach to the authentication and preservation of legal material. That is, the goals of the authentication and preservation program outlined in the act are to allow 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 specific technology 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.

It should be noted that there are some important issues that this act does not address, leaving those issues to other law or policy. The act does not mandate that states publish electronically. The act does not deal with copyright issues, leaving those to federal law. The act does not interfere with the contractual relationship between the state and one or more commercial publishers where the state contracts out the production of its legal material. The act does not supersede the state's rules of evidence, as it simply provides that authenticated legal material is presumed to be a true and correct copy.

Conclusion. Digital information formats have 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 documents. Technology changes quickly enough that state governments must address this issue, as existing electronic legal documents are in danger of being lost already. 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 is based on proposed language from the Study Committee, developed through extensive discussion and debate.

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

1 **AUTHENTICATION AND PRESERVATION OF STATE ELECTRONIC**
2 **LEGAL MATERIALS ACT**

3
4 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Authentication and
5 Preservation of State Electronic Legal Materials Act.

6 **SECTION 2. DEFINITIONS.** For the purposes of this [act]:

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

9 (2) “Legal material” means:

10 (A) a law or statute enacted by the [state legislature];

11 (B) a codified law or statute; [and]

12 (C) an administrative rule adopted under [the state APA][;] [and]

13 [(D) any other state administrative rule][;] [and]

14 [(E) a decision of a state administrative agency that has precedential effect][;]

15 [and]

16 [(F) an appellate judicial decision or other judicial decision that has precedential
17 effect][;] [and]

18 [(G) any other record, as specified].

19 (3) “Official publisher” means:

20 (A) for a law or statute enacted by the [state legislature], the [agency or official];

21 (B) for a codified law or statute, the [agency or official]; [and]

22 (C) for an administrative rule adopted under [the state APA], the [agency or
23 official][;] [and]

1 [(D) for any other state administrative rule, the [agency or official]][:;] [and]
2 [(E) for a decision of a state administrative agency that has precedential effect, the
3 [agency or official]][:;] [and]
4 [(F) for an appellate judicial decision or other judicial decision that has
5 precedential effect, the [agency or official]][:;] [and]
6 [(G) for any other record specified, the [agency or official]][:;] [and]
7 [(H) for any legal material for which no official publisher is designated, the
8 [secretary of state or other agency or official]].

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

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

12 (6) “State” means a state of the United States, the District of Columbia, Puerto
13 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
14 jurisdiction of the United States.

15 **Comment**

16 Several definitions used in this act are those recommended by the Conference, including
17 “electronic,” “record,” and “state.” These words, so defined, have been used in other acts
18 promulgated by the Conference, including notably the Uniform Electronic Transactions Act
19 (UETA),² which has been adopted by 46 states, the District of Columbia, and the Virgin Islands
20 as of May, 2010. The use of these terms in the same manner in several acts leads to a
21 consistency within the laws of each state adopting the several acts in addition to the sought-after
22 uniformity among states.

23
24 **Legal material.** (Section 2(3)). The definition of “legal material” is intentionally
25 narrow. As drafted, it includes only the most basic state-level legal documents: session laws,
26 codified laws, and administrative rules adopted under the state’s version of the Administrative
27 Procedure Act (APA). The act gives adopting states the option to expand the definition, and
28 several alternatives are presented including administrative rules of agencies not covered by the
29 state APA, certain state administrative agency decisions, and certain judicial decisions.

² 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
2 Optional language for administrative decisions is provided in recognition of the varying
3 ways in which state governments may create and regulate executive branch agencies. An
4 individual state may have some administrative agencies that are subject to the provisions of the
5 state APA while other agencies in that state are not.
6

7 State administrative agency decisions with precedential effect is included as an option for
8 two reasons. First, not all state administrative agencies render decisions, and second, not all state
9 administrative agency decisions have precedential effect.
10

11 In some states, the publication of judicial decisions is handled by the judicial branch, over
12 which the state legislature may have no authority to mandate specific procedures such as created
13 by this act. Because of this potential separation of powers issue, judicial decisions are included
14 in this act as an option in the definition of legal material.
15

16 An option is provided for each state to decide for itself what other records may be
17 included in the definition of legal material. Many important documents, like those comprising
18 legislative histories, legislative journals and calendars, and many agency publications, could be
19 included.
20

21 Whether a state legislature can include in the coverage of the act the records from certain
22 executive branch officials (executive orders and proclamations, or attorney general opinions, for
23 example) raises a separation of powers issue similar to that regarding judicial decisions. These
24 records would fit within Section 2(G), if a state desired to include them.
25

26 **Official publisher.** (Section 2(4)). For each type of legal material defined by the act, the
27 state must designate an official publisher. This can, and most likely will, be an existing state
28 agency or employee who already has responsibility for the publication of the legal material. The
29 official publisher is the state employee charged with carrying out the provisions of this act.
30

31 To complete the definition of official publisher, an appropriate government agency or
32 employee for each type of legal material must be identified, as indicated by bracketed language.
33 Because the legal material may come from different departments and even different branches of
34 the government, the official publisher may be one employee or agency, or several. In addition,
35 states should name a default official publisher. This provision ensures that a specific agency or
36 employee has responsibility ultimately for any legal material covered by the act.
37

38 Many states contract with commercial printers or publishers for the production of their
39 legal material. The act does not interfere with that contractual relationship.
40

41 Copyright and licensing of legal material is not addressed, nor are commercial versions of
42 legal materials that are not published under the responsibility of the official publisher. This act
43 only applies to legal material published by the official publisher.
44

1 3 shall authenticate the record. To authenticate the record, the official publisher shall certify that
2 the electronic record is a true and correct copy of the legal material by providing:

3 (1) a method for users to determine that the electronic record is unaltered from the one
4 published by the official publisher; and

5 (2) sufficient information to determine that the certification is valid.

6 **Comment**

7 The intent of this act is to be technology-neutral, leaving it to the adopting state to choose
8 its preferred technology for authentication (and preservation and access) of legal material, and
9 allowing the state to change technologies when necessary or desired. The vulnerability of
10 electronic records to inadvertent or malicious change underscores the importance of ensuring the
11 authenticity of electronic legal material.

12
13 Certification of legal material is the standard in the print world. End-users of legal
14 material understand the meaning of a “certified” document, that is, that the document is official
15 and accurate, as attested to by an official signature, seal, stamp, or other device. This act
16 provides for an equivalent procedure for electronic legal material.

17
18 The act presents an outcomes-based approach to dealing with electronic legal material,
19 using an approach to authentication that consists of two parts. First, the state provides a method
20 for users to determine that the legal material is authentic, or trustworthy. This is comparable to
21 providing certification in the print world. In addition, the state provides information for the end-
22 user to determine that the certification itself is valid. This allows the end-user to be satisfied that
23 the chain of custody for the legal material has not been interrupted and the legal material is,
24 therefore, unaltered. The second step is necessary in the world of electronic legal information,
25 where multiple copies are not available to allow the end-user to compare the legal material with a
26 second copy. The official publisher provides assurance of authenticity and the end-user can
27 verify that assurance. The outcome is that the state’s promise of authenticity is verified.

28
29 Authentication is a term of art in this context. The term “authenticate” has been used
30 different manners in other uniform acts, for example in Article 9 of the Uniform Commercial
31 Code. While acknowledging that the term is used differently in various contexts, its use in this
32 act is consistent with its usage in information management and computer security settings.

33
34 This act does not specify the baseline document against which all others are to be
35 compared for purposes of authentication. The enacting state must identify the baseline
36 document, the “real document,” against which all others are compared, as part of the
37 implementation of this act. The baseline document may vary based type of legal material to be
38 authenticated; in some instances the baseline document may be in print while in others it may be
39 electronic.

1 All states have incorporated electronic technologies into their operations; most have begun to
2 produce electronic legal material, even if the electronic legal material is not designated official.
3 As electronic technologies become indispensable to state operations, security and preservation
4 measures become more important. Electronic records are vulnerable to natural disasters,
5 accidental corruption, mishandling, and intentional change.
6

7 Best practices for providing preservation and security of electronic records include the
8 maintenance of multiple copies of electronic records that are geographically and administratively
9 separated. Multiple copies ensure that at least one copy of important records is available even in
10 an emergency. Storage of copies in separate locations, under control of different personnel, adds
11 an additional measure of security. Two or three copies of electronic records, if secured and
12 separated appropriately, are generally considered adequate for preservation and security
13 purposes. Most states already have adopted these best practices, which are the foundation for the
14 preservation of electronic legal material. This act requires the official publisher of legal material
15 to protect the record using security and preservation methods determined by the state.
16

17 Legal material is often complex in organization and presentation. The formatting of the
18 content of the legal material, including italicization, indentation, numbering, bold face fonts, and
19 internal subdivisions and subsections, can be significant. Hierarchies are defined and priorities
20 are established, for example, by formatting. The official publisher is required to preserve the
21 legally significant formatting of electronic legal material to ensure that both the content and the
22 organization are available in the future.
23

24 Further, the official publisher is required to provide for back-up of electronic legal
25 material by storing additional copies of the legal material for use in restoring records that may be
26 lost or damaged, including by natural disaster. The back-up may be by many means, such as by
27 a mirror site, which is a second, exact, copy of the electronic legal material in a different site
28 than the original, or by creating multiple disks or tapes of the legal material that are stored in
29 remote locations. The back-up may be incremental, essentially tracking all changes to the
30 original, or a continuous backing up of the entire system that saves the complete text of each
31 version, among other methods. Whatever method the state chooses must back-up the original
32 material plus subsequent changes; a changed record becomes a new record with content that
33 must be backed-up also. Legal material is continually updated; states must develop systems that
34 recognize the dynamic nature of legal material and provide for appropriate preservation.
35

36 The rapid evolution of electronic technologies in the last decade, and especially the
37 changes in storage media, emphasize the necessity of updating stored electronic records to new
38 technologies. While the exact specifications for new technologies are not known at the present,
39 the fact that new technologies will be developed is a certainty. This section requires migration to
40 new technologies, as needed, to ensure preservation of legal material and for the continued
41 usability of the information. Preservation must include a means by which the content of the
42 original record can be retrievable in a readable form that can be authenticated.
43

44 **SECTION 7. PUBLIC ACCESS TO ELECTRONIC LEGAL MATERIAL.** The

1 official publisher of legal material in an electronic record shall ensure that the legal material
2 preserved under Section 6 is reasonably available on a permanent basis for use by the general
3 public. If the legal material is published only in an electronic record, the official publisher shall
4 continue to publish it in an electronic record.

5 **Comment**

6 Our democratic system of government depends on an informed citizenry. Legal material
7 includes information essential to all citizens in a democracy, whether the legal material is
8 effective currently or is of historical value only. Citizens must have reasonable access to all
9 legal material. This section highlights the importance to the citizenry of legal material by
10 requiring permanent public access to electronic legal material. Together with print's ubiquity of
11 copies and access, permanent public access to electronic legal material allows citizens to stay
12 informed of legal developments and carry out their democratic responsibilities.

13
14 Legal material preserved under this act must be "reasonably available" to the general
15 public. Reasonable availability does not necessarily mean that the information must be accessible
16 around the clock, every day of the year. An enacting state has discretion to decide what is
17 reasonable, which should be determined in a manner consistent with other state practice. It may
18 mean that the legal material is available during business hours at publicly accessible locations,
19 such as designated state offices, public libraries, a state repository or archive, or similar location.
20 This section recognizes that historical information, while important, is not usually as essential to
21 all citizens as is current legal material. Therefore, access to preserved legal material may be
22 limited, although it cannot be restricted to the point of unavailability. Legal material published
23 only in an electronic record must be maintained in an electronic record to facilitate legal research
24 and continued access to the legal material as originally published.

25
26 Access to preserved electronic legal material may be limited by the state's determination
27 of reasonableness, but access must be offered permanently. That is, the electronic legal material
28 must remain available in perpetuity. This requirement makes electronic legal material
29 comparable to print legal material, which is stored on a permanent basis in libraries, archives,
30 and offices.

31
32 **SECTION 8. STANDARDS.** In implementing the requirements of this [act], the

33 official publisher shall consider:

34 (1) standards and practices of other jurisdictions;

35 (2) any standards on authentication and preservation of records adopted by national

36 standard-setting bodies; and

1 (3) the needs of electronic record users.

2 **Comment**

3 Standards for authentication, preservation, and permanent access of electronic records are
4 beginning to be developed by some governmental organizations at both state and federal levels.
5 Like many other technology-related practices, these standards will remain unfinished and under
6 revision for some time.

7
8 This language of this section, based on a similar provision in the Uniform Electronic Real
9 Estate Recording Act, requires consideration of the changing nature of these standards. The
10 official publisher must develop plans to authenticate and preserve legal material, determine
11 appropriate standards to allow for implementation of the plans, and update the plans as
12 necessary. The state's standards should include a method to evaluate the effectiveness of the
13 official publisher's actions in providing for authentication, preservation, and permanent access to
14 electronic legal material.

15
16 Each enacting state will determine its own specific practices but, in the interest of
17 efficiency, states are encouraged to communicate and coordinate in the development of
18 authentication, preservation, and permanent access standards. Several national organizations are
19 considering the promulgation of best practices statements and standards; their work, when
20 completed, might offer sound guidance. International organizations may also be tackling this
21 issue and, to the extent that their work is relevant to US states, it could also be considered.
22

23 **SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
24 applying and construing this uniform act, consideration must be given to the need to promote
25 uniformity of the law with respect to its subject matter among the states that enact it.

26 **Comment**

27 This language is based on a similar provision in the Uniform Electronic Real Estate
28 Recording Act.
29

30 **SECTION 10. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
31 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
32 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
33 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
34 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15

1 U.S.C. Section 7003(b).

2 **Comment**

3 This language is based on a similar provision in the Uniform Electronic Real Estate
4 Recording Act.

5

6 **SECTION 11. EFFECTIVE DATE.** This [act] takes effect [date]...

7 **Comment**

8 This act applies to legal material created after the effective date of the act. Each enacting
9 state will need to determine the proper date of effectiveness of the act, including whether
10 additional time, beyond the usual date of effectiveness of its statutes, is needed in order to meet
11 the requirements of authentication, preservation and public access.