

# Is Primary Legal Information on the Web Trustworthy?

By David G. Badertscher and Deborah E. Melnick

In 1821, in an anniversary address before the Suffolk Massachusetts Bar, Justice Joseph Story stated, “The mass of the law is, to be sure, accumulating with an almost incredible rapidity . . . (i)t is impossible not to look without some discouragement upon the ponderous volumes, which the next half century will add to the groaning shelves of our jurists.”<sup>1</sup>

How discouraged would Justice Story be given the proliferation of digital primary legal resources offered on the Internet today?

Our guess is that he would be “proportionately discouraged.” However, it’s doubtful that Mr. Story or the jurists of the 1800s were concerned with the trustworthiness of the legal information found in the volumes held on the bookshelves of their law libraries. Printed words from reputable sources are trustworthy.

Given that the 2009 *American Bar Association Legal Technology Survey* indi-

cates that a majority of lawyers now use free online legal resources in their research<sup>2</sup> (much of which is currently provided by government), how concerned with the trustworthiness of primary legal resources on the Web should today’s jurists be?

## The State of Authenticity

The American Association of Law Libraries (AALL) published the *State-by-State Report on Authentication of Online Legal Resources (Authentication Report)* in 2007 that answered this very important and timely question.<sup>3</sup> The comprehensive report examines and draws conclusions from the results of a state survey that investigated whether government-hosted legal resources on the Web are official and capable of being considered authentic. The survey was conducted by the Access to Electronic Legal Information Committee of AALL. The principal authors and editors of the comprehensive

report were Richard J. Matthews, editor in chief of the 2005–2006 Access to Electronic Legal Information Committee, and Mary Alice Baish, who is now director of the Government Relations Office of AALL; volunteer authors were responsible for sections within the comprehensive report devoted to individual states. The survey and comprehensive authentication report could not have been completed without their efforts. As Robert Berring remarks in his essay *The Heart of Legal Information*: “The *Report* is a masterful review but the results are grim. No state is currently on top of this issue.”<sup>4</sup>

## The State of Permanent Public Access

The *Authentication Report* follows the publication in 2003 of AALL’s *State-by-State Report on Permanent Public Access to Electronic Government Information* that researched and reported what, if any-

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thing, state governments were doing to meet the enormous challenges of ensuring permanency and public accessibility of government information on the Web.<sup>5</sup> The *Permanent Public Access Report* raised national awareness and encouraged states to take steps to ensure permanent public access to electronic state government information. As a result, several states have enacted legislation requiring permanent public access. Integral to providing permanent access is providing for the future migration of information made



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permanent using today's technology if that technology evolves in unforeseen ways. Further discussion continues toward ensuring that all preservation methods for safeguarding data offer continuous future access utilizing proven technology standards. In its *Final Report* published in February 2010, the Blue Ribbon Task Force on Sustainable Digital Preservation and Access confirmed that "[e]conomically sustainable preservation . . . is an urgent societal problem" . . . "access to information tomorrow depends on preservation actions taken today. A fundamental fact of digital sustainability is that without preservation, there is no access."<sup>6</sup>

The trustworthiness of online legal resources is fundamental to permanent public access and is inherently a matter of great concern to the legal community. Thus, AALL undertook its investigation of the authenticity of online legal resources in 2006–07 as an important follow-up and corollary to the *Permanent Public Access Report*.

### Official vs. Authentic

The *Authentication Report* presents the findings of a survey that targeted six sources of law: state administrative codes and registers, state statutes and session laws, and state high and intermediate appellate court opinions. The summary answer to the question of the trustworthiness of these online legal resources is that a significant number of state online resources are official, but none are authenticated or afford ready authentication by standard methods. To clarify the terms *official* and *authentic*, the *Authentication Report* defines *official* as a resource that is "governmentally mandated or approved by statute or rule."<sup>7</sup> As used by Ruth Stevens and Jane Edwards in their article "State Primary Legal Materials in a Digital Era," "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. Typically, an authentic text will bear a certificate or mark that conveys information as to its certification."<sup>8</sup>

Lack of certification or mark of authenticity is particularly troublesome

where states have turned solely to electronic dissemination and eliminated print publications. In these instances, the lack of disclaimers or statements regarding the information's status may be misleading the public.

State online primary legal resources are, therefore, not sufficiently trustworthy.

### Findings

AALL's *Authentication Report* raises concerns that must be addressed by the states, both as high-level policy decisions and as practical matters. AALL believes that the *Authentication Report* will serve as a guide for states to correct smaller-scale deficiencies in their current dissemination of online legal resources and to initiate long-term progress toward the all-digital legal information environment that will enhance each state's fundamental interaction with its citizens.

The *Authentication Survey's* findings indicate that while some states are beginning to address issues discussed in the *AALL Authentication Report*, the government publishers of electronic legal information have not been sufficiently deliberate in their policies and practices to ensure that information obtained from their websites can be relied upon and can be verified to be complete and unaltered when compared with the version approved or published by the content originator. Such verification is an essential prerequisite if digital legal resources are to be trustworthy and truly merit both official and authentic status. Where some states allow bulk data transfers of government information, the lack of authentication and verification at the origination site is problematic as inaccuracies or unauthorized alterations can permeate throughout the distribution channels for those basic data.<sup>9</sup>

In its dissemination of information, the U.S. Government Printing Office (GPO) has initiated an authentication system for PDF documents accessible through its beta Federal Digital System, which may serve as a model to states thus far.<sup>10</sup> GPO and other purveyors of online government information continue to face complications regarding chain of custody and the variety of formats in which

information appears (such as the GPO's XML version, audio or video files). They also struggle with complex challenges posed by additional materials from other publishers, which are incorporated by reference into GPO-offered materials. No single authentication method for ensuring trustworthiness meets the requirements of all formats or the needs of all publishers.

The authentication survey and report are not the only steps AALL has taken to address this issue. In April 2007, it convened a National Summit on Authentication of Digital Legal Information near Chicago where approximately 50 delegates from the judiciary, the legal community, state governments, and interested organizations, all of whom share AALL's concern about ensuring the authenticity of digital legal information, participated in discussions about the *Authentication Report* findings and explored legal and technological solutions to ensure that state online legal resources are authenticated and trustworthy.<sup>11</sup>

One of the first substantive articles analyzing the findings and conclusions of the *Authentication Report* to be published after the National Summit was written by the Hon. Herbert B. Dixon Jr., who sits on the Superior Court of the District of Columbia and was one of the delegates to the National Summit. In his article "The Lack of Effort to Ensure Integrity and Trustworthiness of Online Legal Information and Documents," Judge Dixon cautions that, as more and more courts and agencies institutionalize the use of electronic filing and the maintenance of records, the courts will need to address certain lurking issues to ensure the integrity and trustworthiness of legal documents.<sup>12</sup> He identifies the first lurking issue as ". . . whether the document or record received by electronic means is the same as the document or record transmitted. That is, has the submission been corrupted during the process of its uploading to the Web site or during its transmission?"<sup>13</sup> In other words under what conditions can a document transmitted electronically and uploaded to a website be trusted by the recipient? This issue and a parallel issue concerning "long term

integrity of those same electronic documents,"<sup>14</sup> also mentioned by Judge Dixon, go to the very heart of concerns raised in the findings of the AALL *Authentication Report*. Dixon concludes his article by writing, "The AALL study (*Authentication Report*) is convincing that the time is now to implement these steps to ensure the integrity and trustworthiness of online legal information."<sup>15</sup>

### The Urgency

Indeed, concerns are intensifying. In an effort to reduce costs, governments are substituting online-only versions for traditional-print primary legal materials with few, if any authentication or preservation efforts in place. At the same time, barriers to citizens' access are being lowered: the proposed National Broadband Plan<sup>16</sup> expands access geographically to individuals, to intermediary institutions (such as libraries), and to people with disabilities; computing equipment is more affordable; wireless is more available, as are the variety and use of mobile devices. Do-it-yourself programs encourage citizens to seek free online government legal resources. While meeting the goal in expanding an ever-increasing expectant citizens' access to legal information, states may not have adequate plans for retaining that information into the future. Institutions are closing law libraries, long-held stewards of continued resource availability, or they are reducing library staff and budgets, leaving law firms, solo practitioners, and the public in those areas with few options to continued quality information. In making today's digital information decisions, we need to ask, what will the landscape of online legal primary research materials be in 10 years?

As with anything else on the Web, there is always an element of risk involved in assuming that any primary source legal materials retrieved via the Web are in fact the official and authenticated documents intended. Since the integrity of these materials is a critical consideration for the end user, it is essential that every possible effort be made to minimize risk associated with their identification and retrieval as much as possible. That is why

initiatives such as the production and publication of the *Authentication Report* and its associated Surveys by the AALL are so important. To reach desired goals, ongoing efforts must continue among all stakeholders involved with the creation, dissemination, and preservation of digital information made available to the public until adequate solutions can be found.

### Increased Attention

In February 2008, the Uniform Law Commission informed AALL that it had approved the creation of a new Study Commission on Online Authentication of Legal Materials to investigate the issues and discuss the feasibility of a uniform law or model to act on digital authentication in the hopes of providing guidelines to state governments. The new Committee offered a draft act (thus far entitled "The Authentication and Preservation of State Electronic Legal Materials Act") for comment in December 2009. In March 2010, an interim draft of The Authentication and Preservation of State Electronic Legal Materials Act was prepared, followed a few months later by a revised draft which was presented and discussed at the Uniform Law Commission Annual Meeting in July 2010. At the Annual Meeting, the Committee of the Whole of the Uniform Law Commission accepted the revised draft and requested the drafting committee to meet again to consider comments and questions. Following these discussions, a meeting devoted to further consideration has been scheduled to be held November 19–21, 2010, in Washington, D.C. in preparation for a second reading, with the hopeful expectation that The Authentication and Preservation of State Electronic Materials Act will be approved by the Uniform Law Commission in 2011.<sup>17</sup>

As mentioned earlier, the state survey upon which the findings in the *Authentication Report* are based was conducted by the Access to Electronic Legal Information Committee of AALL. That Committee [under its revised title, Electronic Legal Information Access and Citation Committee] is continuing to help address these issues and concerns in

a variety of ways, including developing guidelines for ensuring greater authenticity of information on government websites and continuing to monitor the progress of state-by-state efforts related to addressing issues and concerns noted in the *Authentication Report*. To further these efforts, AALL and its members would like to build alliances with states to help overcome legislative and technical obstacles to providing residents of each state with permanent access to reliable official legal information on the Web. This year the AALL Government Relations Office organized State Working Groups to Ensure Access to Electronic Information (composed of AALL member volunteers) with the task, among other things, to create a national inventory of all primary legal materials in all levels of government.<sup>18</sup> Of particular interest is the information being currently offered in electronic format only and the information that has been earmarked for online-only publication in the near future. This effort assists Public.Resource.Org in the .gov project whose goal is the provision of open free access to government information.<sup>19</sup> Other associates in this effort are the Library of Congress, Berkman Center for Internet and Society, and several major U.S. universities.

In mid-March 2010, a federal bill was introduced, the Public Online Information Act, that seeks to ensure permanent public domain online access to executive branch public documents at no or low cost. This Act would “establish an advisory committee to issue nonbinding government-wide guidelines on making public information available on the Internet.”<sup>20</sup> This includes providing information in a variety of accessible and useful formats and the historical preservation of iterative or superseded online primary legal information. The Act is intended to influence the legislative and judicial branches of government to follow the regulatory proposals in like manner to the executive branch. The Act also heightens awareness of the trend towards government’s release of bulk data and concerns of protecting nonpublic information from release. The implications of continued

release of bulk data to developers absolutely raises the bar regarding trustworthiness and authenticity guarantees at the source. In the judicial branch, the recent practice of allowing direct downloads of unauthenticated information in electronic case filing systems may be of concern as inaccuracies or alterations can have a substantial effect on the lives of individuals involved or on the legal matters of those utilizing the information. The Oklahoma Supreme Court, in an Administrative Decision last October, announced that Oklahoma courts would not allow bulk data distribution.<sup>21</sup>

The 2009–10 updates to the *AALL State-by-State Report on the Authentication of Online Legal Information* show that states are making progress in the defined areas. “One of the most significant changes noted in the 2009–10 update is the addition of disclaimers to many state Web sites regarding authentication and official format of the information online.”<sup>22</sup> What are the odds that the resources used by Justice Story and his colleagues of the day were laden with disclaimers?

### The Authentication Process

Achieving an acceptable level of authenticity and trustworthiness requires appropriate authentication procedures. Standard methods of authentication may include encryption, digital signatures, and public infrastructure, but other methods to adopt best practices are also possible. Certification and other types of formal endorsement of legal resources are a vital link in the chain of custody involved in dissemination, maintenance, and long-term preservation of digital information. Maintaining a chain of custody is necessary to preserve evidence that legal resources have been, and remain, authenticated and trustworthy. That chain may contain a link to computer technologies that guarantee the very copy delivered to one’s computer screen is uncorrupted and complete or it may be part of other archival methods. A chain of custody can be thought of as the audit trail of the authentication process.

We now offer a closer look at one of many possible approaches to authentica-

tion in a real-world environment and offer some observations regarding challenges and obstacles that are being confronted in the effort to achieve an acceptable level of authentication of Web-based documents or records including those under discussion in this article. As noted earlier, standard methods of authentication may include encryption, digital signatures, and public infrastructure, but other methods to adopt best practices are also possible. In the illustrative discussion below, however, we have tried to keep things relatively simple by confining the illustrative procedure to only digital signatures, digital certificates, certification authorities (CAs), and the relationships between them. However, many of the issues mentioned, particularly those regarding trust and verification, are much more universal and apply to many, if not all, authentication initiatives. In this Internet document example, we first need to recognize that while digital signatures and their accompanying public and private keys may help prove the authenticity of documents transmitted electronically, they really only show that the public key and the private key used to encrypt and decrypt the document are what is known as a matched pair. They certainly do not provide any definitive proof that the judge or lawyer in this example who is initiating a secured online transaction over the Internet is not actually another person posing as the judge or lawyer. The other person could either steal the judge’s or lawyer’s identification and pose as the person initiating the transaction, intercepting the document as it makes its way through the Internet, or change the original document to either a modified or completely changed document, possibly substituting the interceptor’s own digital signature and public key (both masquerading as the person initiating the transaction) before passing the document on to the intended recipient. The question now becomes, how is the intended recipient to know whether the sender of the document is really the judge or lawyer who purportedly initiated the transaction?

From concerted efforts to resolve these quandaries came the idea of having a trusted third party issue a certificate

vouching for the identity of the certificate holder at the time the certificate is issued. This trusted third party, known as a “certification authority,” sets up identity validation rules that it follows very carefully when issuing certificates. Under these rules a certification authority, or “CA,” might have different levels of trust for certificates, with the lowest-level certificate meaning that the CA verified that an applicant’s identification information matches that in public records. By signing the certificates it issues with its own private key, the CA attests to the connection of a public key to the person in whose name the certificate has been issued, and attests to its own validation of that person’s identity. For a certificate issued and signed by a CA to be useful in our Internet document example, it is imperative that the following conditions be met: first, all parties to the transaction must agree that the CA can, in fact, be trusted; second, the intended recipient also would have to agree that the trust level of the certificate that validated the judge’s or lawyer’s identity is high enough that the intended recipient feels assured that enough has been done by the CA before issuing that level of certificate to confirm the identity of the judge or lawyer initiating the transaction. Finally, all steps as described in this scenario, or in any real-life authentication process, should be tracked and bound together to form an audit trail. That audit trail can be referred to as a chain of custody.

To summarize, hopefully this scenario has demonstrated that much in the

authentication environment comes down to trust, verification, and authority. If services offered by digital certificates during the authentication process are carried out in accordance with best practices, and if all parties can agree to accept each other’s certificates with confidence and trust, a foundation will have been laid upon which a solid authentication system can be built.<sup>23</sup>

### Conclusion

For at least the past 100 years courts have been relying increasingly on social, political, historical, and recently scientific data to bolster primary sources within their

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opinions. Over the past 10 years that trend has become significantly more pronounced due to the rapidly increasing accessibility to all types of legal information on the Web.

For their own reasons, both producers of legal information (e.g., publishers) and consumers (e.g., judges, lawyers, and increasingly members of the public) are relying progressively more on the Web and related technology to meet their information needs. For information producers it is largely a matter of cost and perceived

efficiencies of production. For consumers it is often a matter of convenience, perceived accessibility, and sometimes cost. Collectively, this trend is producing a near paradigm shift toward using Web-based technology as the primary (and sometimes only) source for searching and retrieving all types of legal information, regardless of its authority and authenticity. The mounting variety and diversity of legal information on the Web can be

either a blessing or a curse, depending on circumstances. For some, the unparalleled diversity and variety of legal information will in and of itself be completely satisfying; for others with more specialized requirements, more needs to be done to develop and to clarify best practices for identifying and retrieving authentic and authoritative primary legal information on the Web.<sup>24</sup>

Although this article focuses on the information needs and challenges regarding judges and others specializing in the law, others should also be aware of and concerned about the challenges of authority and authenticity; we are all living under the rule of law and we are all thus affected. Under these environmental conditions, how is the consumer of government-provided online primary legal information able to determine if the results of his or her Web search is sufficiently authoritative and authentic to meet needs without causing possible harm? Ensuring that primary online legal resources are trustworthy today and tomorrow is the very serious challenge that is now being taken up at the state level by the American Association of Law Libraries, The National Conference of Commissioners on State Laws, members of the judiciary, and others. ■

### Endnotes

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9. Data.gov disclaimer regarding secondary use: "Data accessed through Data.gov do not, and should not, include controls over its end use. However, as the data owner or authoritative source for the data, the submitting Department or Agency must retain version control of datasets accessed. Once the data have been downloaded from the agency's site, the government cannot vouch for their quality and timeliness. Furthermore, the US Government cannot vouch for any analyses conducted with data retrieved from Data.gov." Data.gov, Data Policy, Statement #5, <http://www.data.gov/datapolicy>.

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23. For a more detailed discussion, see, for example, JANE K. WINN & BENJAMIN WRIGHT, LAW OF ELECTRONIC COMMERCE § 1.04[D], [E] (4th ed., Aspen Law and Business, 2001).

24. Michael Whiteman, *The Death of Twentieth Century Authority*, 58 UCLA Law Rev. Discourse 27, 31 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1540164](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1540164) (Jan. 21, 2010). This article traces the shift away from traditional authority, outlining some of the emerging problems including those associated with the authentication of online legal reference materials.