NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report

Relating to

Uniform Electronic Legal Material Act

April 8, 2013

This Draft Tentative Report is distributed to advise interested persons of the Commission's tentative recommendations and the opportunity to submit comments.

Comments should be submitted no later than **June 15, 2013**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this tentative report or direct any related inquiries, to:

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UNIFORM ELECTRONIC LEGAL MATERIAL ACT

Introduction

One of the projects approved and recommended for enactment in all states by the Uniform Law Commission (ULC, formerly NCCUSL) is the Uniform Electronic Legal Material Act (UELMA). The UELMA was released by the ULC in July 2011.

The UELMA is being promoted by the American Association of Law Libraries, and is being discussed very seriously by the New Jersey Law Librarians Association. Liaisons from the Seton Hall Law School library and the Rutgers School of Law library have asked that the Commission review the Act for possible introduction in New Jersey and enactment by the Legislature. When making their request, the library liaisons noted that the federal government already authenticates its materials with an electronic signature.

The ULC explains, in its summary of the Act, that the availability of government information online facilitates transparency and accountability, provides widespread access to essential information, and encourages citizen participation. The UELMA was designed to address the need to provide and manage electronic government information in a manner that guarantees trustworthiness and continued access.

Prior to the drafting of the UELMA, a March 2007 *State-by-State Report on Authentication of Online Legal Resources* prepared by the American Association of Law Libraries analyzed the trustworthiness of state online legal resources. The Report determined that while a significant number of state online legal resources are *official*, none are *authenticated* or easily authenticated by standard methods. American Association of Law Libraries, *State-by-State Report on Authentication of Online Legal Resources* (2007), p. 7. As a result, the *State-by-State Report* said that state online legal resources are "therefore not sufficiently trustworthy" and that "citizens and law researchers may reasonably doubt their authority and should approach such resources critically". *Id.*

The UELMA is designed to provide for the authentication, preservation, and accessibility of official electronic state legal material and to assist state governments in guaranteeing the free flow of trustworthy legal information. It gives states discretion in determining what categories of "legal material" will be covered. The Act does not affect any relationships between an official state publisher and a commercial publisher, nor does it affect copyright laws or the rules of evidence.

The choice of technologies for authentication and preservation is left to the states, but adoption of the UELMA will harmonize standards for acceptance of electronic legal material across jurisdictional boundaries. The Act is intended to be complementary to the Uniform Commercial Code (UCC, which covers sales and many commercial transactions), the Uniform Real Property Electronic Recording Act (URPERA, which provides for electronic recording of real property instruments), and the Uniform Electronic Transactions Act (UETA, which deals with electronic commerce).

Background

The *State-by-State Report* describes an "official" version of legal materials as one that possesses the same status as a print "official" legal resource – one that is "governmentally mandated or approved". *Id*. at 7-8. An "authentic" legal material is described as "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". *Id*. at 8. The findings of an authentication survey set forth in the *State-by-State Report* include the following: (1) states have begun to discontinue print official legal resources and substitute online official legal resources; (2) states have not acknowledged the important needs of citizens and law researchers seeking trustworthy government information – even with regard to "official" legal resources; and (3) only eight states have provided for permanent public access to one or more of their primary legal resources. *Id*. at 10-13.

According to the information provided by A. Hays Butler, of the Rutgers Law School – Camden, and contained in the *State-by-State Report*, New Jersey does not certify as official and authentic the online versions of the state session laws, statutes or court opinions. *Id*. at 142.

The New Jersey Legislature's website provides access to an electronic database containing New Jersey statutes. *Id.* The database does not indicate whether it is official or not. It does, however, contain the following statement: "This statutory database is unannotated and as such may include laws that have not become operable due to unmet conditions, have expired, have been ruled inoperable by a court, or have otherwise become inoperable. Effective dates are not typically included. Users should diligently read applicable statute source law and case law." *Id*. The statute that establishes the online database does not certify that the database is intended to be an authoritative source of the statutes. *Id.* at 143. The *State-by-State Report* suggests that since the "online statutory database leaves the user unsure whether it is *official* or not, it appears reasonable to conclude that the database, in fact, is not *official*". *Id*. The Report concludes that the session laws found on the same site are likewise not *official* and notes that the statute requiring the session laws to be included in the database does not even refer to the "official" session laws. *Id*.

With regard to New Jersey case law, the *State-by-State Report* explains that decisions of the Supreme Court of New Jersey and the Superior Court, Appellate Division, are available on the website of the Rutgers Law Library – Camden by agreement between the Law School and the Administrative Office of the Courts. *Id*. The Report suggests that the site cannot be considered *official* since no statutory provision has declared it so, nor has any other entity with apparent authority, and the relevant *Rules of Court* state that the only official and authoritative source for appellate decisions are the *official* print reporters. *Id*. at 143-144.

There is no online version of the New Jersey administrative code or the administrative register. *Id*. at 144.

The UELMA, in the Prefatory Note, says that "[p]roviding information online is integral to the conduct of state government in the 21st century." The Note goes on to say that "[t]he 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." Electronic information, the Prefatory Note points out, is susceptible to being altered, accidentally or maliciously, at each point where it is stored, transferred or accessed and these alterations may be undetectable by the consumer. In addition, the Note suggests that the ease with which electronic material may be altered raises the issue of how legal information with long-term historical value will be preserved for future use. The benefits associated electronic materials are described as "severely limited" if the information becomes unusable because of technological changes.

The UELMA is designed to be an outcomes-based approach to the authentication and preservation of legal materials. The goals of the Act are to "enable end-users to verify the trustworthiness of the legal materials" and to "provide a framework for states to preserve legal material in perpetuity in a manner that allows for permanent access". The Act consists of 12 sections, including the Short Title and Effective Date sections.

Draft

Section 1. Short Title

This [act] may be cited as the Uniform Electronic Legal Material Act.

Source: New.

Section 2. Definitions

In this [act]:

a. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

b. "Legal material" means, whether or not in effect:

(1) the New Jersey Constitution of 1947, as amended;

(2) the New Jersey Chapter Laws, including both Advance Laws and Pamphlets;

(3) the New Jersey Permanent Statues Database;

(4) a state agency rule that has or had the effect of law;

(5) the following categories of state administrative agency decisions:

(A) the recommended reports and decisions of administrative law judges and the final decisions and order of State agencies issued in accordance with section 10 of the "Administrative Procedure Act," P.L.1968, c.410 (c.52:14B-10);

(B)any other state administrative agency decisions, opinions, orders, or rulings with legal effect, including but not limited to decisions, opinions, orders, or rulings of the Board of Public Utilities, the Civil Service Commission, the Council on Local Mandates, the Department of Banking and Insurance, the Division of Workers Compensation, the Government Records Council, and the Public Employment Relations Commission

(6) reported decisions of the following state courts: the Supreme Court of New Jersey, the Superior Court of New Jersey, and the Tax Court of New Jersey;

(7) the Rules Governing the Courts of the State of New Jersey; and

(8) Formal Opinions of the Attorney General of New Jersey.

c. "Official publisher" means:

(1) for the New Jersey State Constitution of 1947, the Office of Legislative Services;

(2) for the New Jersey Chapter Laws, the Office of Legislative Services;

(3) for the New Jersey Permanent Statutes Database, the Office of Legislative Services;

(4) for a rule:

(A) published in the New Jersey Administrative Code, the Office of Administrative Law;

(B) not published in the New Jersey Administrative Code, the state agency adopting the rule;

(5) for a state administrative agency decision:

(A) included under paragraph (b)(5)(i), the Office of Administrative Law;

(ii) included under paragraph (b)(5)(ii), the state agency issuing the decision;

(6) for a state court decision included under paragraph (b)(6), the Administrative Office of the Courts;

(7) for the Rules Governing the Courts of the State of New Jersey, the Administrative Office of the Courts;

(8) for the Formal Opinions of the Attorney General, the Office of the Attorney General.

d. "Publish" means to display, present, or release to the public, or cause to be displayed, presented, or released to the public, by the official publisher.

e. "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.

f. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Source: New.

COMMENT

As the ULC Report explains, in the Comment to Section 2, "[t]he definition of 'legal material' is intentionally narrow. As drafted, it includes only the most basic state-level legal documents: the state constitution, session laws, codified laws, and administrative rules with the effect of law. The act suggests as alternatives a range of additional legal material." Each enacting state is given discretion in identifying what types of legal documents may also be covered by the act.

The Report notes that in "some states, the publication of judicial decisions and court rules is handled by the judicial branch, over which the state legislature may have no authority to mandate specific procedures such as those created by this act. Because of this potential separation of powers issue, judicial decisions and court rules are included in this act as an alternative in the definition of legal material."

A question that must be addressed during the pendency of this project is whether the inclusion of reported decisions and the Court Rules in this act runs afoul of the constitutionally mandated separation of powers and the exclusive authority of the New Jersey Supreme Court over court administration. References to the case law and the Court Rules are included at this time for purposes of discussion. Since the *Winberry v. Salisbury* issue was clearly addressed by Justice Zazzali in an opinion concurring in part and dissenting in part in *Ferreira v. Rancocas Orthopedic Associates*, 178 *N.J.* 144, 161 (2003), quotes from that opinion follow.

> Article VI, section 2, paragraph 3 of the New Jersey Constitution provides that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." In *Winberry v. Salisbury*, 5 *N.J.* 240, 247, 255…*cert. denied*, 340 *U.S.* 877…(1950), this Court interpreted that provision as providing the judicial branch with exclusive authority over court administration, including court practice and procedure. In reaching that determination, we observed that "[r]ules of the court are made by experts who are familiar with specific problems to be solved and the various ways of solving them."…Underlying our holding in *Winberry* was the doctrine of separation of powers and its recognition that each branch of government is suited to make certain types of decisions and should "exercise fully its own powers without transgressing upon the powers rightfully belonging to a cognate branch." [citations omitted]

Ferreira v. Rancocas Orthopedic Associates, 178 *N.J.* 144, 161 (2003) (Zazzali, concurring).

"*Winberry* and its progeny instruct that whether a legislative enactment impermissibly overrides a court rule depends on the character of the enactment. If the statute in question involves procedural as opposed to substantive rights, the court rule generally prevails." *Id*. "In *Winberry*, we distinguished between substantive and procedural laws by their primary effects on the parties. Substantive law defines the parties' rights and duties, whereas procedural law regulates the means through which those rights and duties are enforced…In other words, '[i]f it is but one step in the ladder to final determination and can effectively aid a court function, it is procedural in nature and within the Supreme Court's power of rule promulgation.'" *Id.* at 162.

It has been acknowledged, however, that

> [a]lthough *Winberry* expressed the substantive/procedural divide in rather clear terms, that distinction has been difficult to apply because statutes and rules can have both procedural and substantive implications…"It occasionally happens that an underlying matter defies exact placement or neat categorization…Adding to the complexity of the task is the fact that the separation between the legislative and judicial branches has " 'never been watertight.'…Indeed, our precedent makes clear that, in the spirit of comity, we at times have shared authority over administration of the judicial system with the Legislature…In doing so, we have observed that "the doctrine of separation of powers was never intended to create, and certainly never did create, utterly exclusive spheres of competence." [citations omitted]

Id. at 162-163. The "jurisprudence since *Winberry* demonstrates that the procedural characteristics of a legislative enactment do not necessarily determine the enactment's fate." *Id*. at 163.

> Rather, judicial toleration of legislative intrusion has pivoted on a two-prong analysis. Initially, we have considered whether the judiciary has fully exercised its power with respect to the matter at issue…In the absence of complete judicial action, we then have inquired into whether the statute serves a legitimate legislative goal, and, "concomitantly, does not interfere with judicial prerogatives or only indirectly or incidentally touches upon the judicial domain"…In other words, we have accommodated legislative

> enactments touching on integral areas of the judicial system only when those enactments "have not *in any way interfered* with this Court's constitutional obligation" to "insure a proper administration of the court system."…[citations omitted]

Id.

The UELMA Report also explains that

> states may decide to expand the definition of legal material beyond that offered as alternatives. For example, in some states, an initiative or referendum process may result in the creation of statutory law outside of, or in addition to, the legislative process. An enacting state may choose to include in the definition of legal material the various documents created in an initiative or referendum process, including especially the final, uncodified form (similar to a session law) as passed by popular vote. States may decide to include enacted, but subsequently vetoed, legislation. Other states may decide to include certain categories of municipal or county legal material in the act.
>
> Many important sources of law, such as legislative journals and calendars, reports of legislative confirmations and other hearings, versions of bills, gubernatorial orders and proclamations, attorney general opinions, and many agency publications, might be included in the act's coverage…Whether a state legislature can include in the act the records from certain executive branch officials (executive orders and proclamations, or attorney general opinions, for example) raises a separation of powers issue similar to that regarding judicial decisions.

As indicated above for judicial decisions and Court Rules, executive branch materials have been included in this draft at this time for purposes of discussion.

The Report explains that the "official publisher is the state actor charged with carrying out the provisions of this act" and also that the

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

The underlined language in this draft statutory section was recommended by the New Jersey Law Librarians Association.

So far, according to the ULC, the UELMA has been enacted in three states (California, Colorado and Minnesota) and has been introduced in 10 states (Connecticut, Hawaii, Illinois, Massachusetts, Missouri, Nevada, North Dakota, Oregon, Pennsylvania and Rhode Island).

Some states that have enacted or are considering the act have elected to define legal materials more narrowly and use only the first four items shown in the definitions. The definition of legal material recommended by the New Jersey Law Librarians Association is more inclusive than that found in those states and Staff hopes that the input from commenters will help determine whether a broad or narrow definition is appropriate for use here.

California and Colorado chose to include only their state constitutions, state statutes, and state rules as defined legal materials. Of the 10 states that have introduced the UELMA, three have used the more limited set of defined legal materials, and seven have expanded the list to include decisions of their state courts (at the various levels), state session laws, state administrative codes, and state administration agencies.

Section 3. Applicability

a. This [act] applies to all legal material in an electronic record that is designated as official under Section 4 and first published electronically on or after [the effective date of this [act]].

b. This [act] applies to the following legal material in an official electronic record that was first published before [the effective date of this [act]]: [insert proper name or title here].

Source: New.

COMMENT

As the ULC Report explains, in the Comment to Section 3, the act "is intended to complement, and not affect, an enacting state's existing public records or records management laws and practices, under which non-electronic legal material is preserved. This act does not affect a state's responsibility to preserve non-electronic legal material." Instead, it applies to

> legal material designated as official and first published in an electronic record on or after the act's effective date in the enacting state. If, after the effective date, an enacting state republishes legal material in an electronic record that was previously not published in an electronic record, and if the state designates as official the newly republished legal material, the UELMA applies. This may occur, for example, when the state is transitioning a category of legal material from print to electronic format. If legal material as defined by the act is first published only in an electronic record subsequent to the effectiveness of the act, the state must meet the requirements of the UELMA.

Section 4. Legal Material in Official Electronic Record

a. If an official publisher publishes legal material only in an electronic record, the publisher shall:

(1) designate the electronic record as official; and

(2) comply with Sections 5, 7, and 8.

b. An official publisher that publishes legal material in an electronic record and also publishes the material in a record other than an electronic record may designate the electronic record as official if the publisher complies with Sections 5, 7, and 8.

Source: New.

COMMENT

Since the Act is "outcomes based" it does not mandate electronic publishing. As the ULC Report explains, in the Comment to Section 4, the act "does not direct a state to publish its legal material in any specific format or formats. The act leaves policy decisions regarding format of its legal material to the state." The Comment to Section 4 further explains that

> There are no publication standards for legal information shared among the states at this time, and within a single state there may be multiple publishing practices for legal material. For example, today in a single state, the state's code may be published in a yearly paperback edition and electronically, court reports may be published in hardbound volumes, and the administrative regulations may be available in a looseleaf format or only in an electronic format. All states are transitioning from a print-only publishing environment to either an environment in which legal materials are published in a mix of formats or one in which legal materials are published in electronic format only. Many states publish the same legal material in both print and electronic formats. A state may designate as official as many formats of its legal material as it wishes. If legal material in an electronic record is designated as official, the requirements of the act must be met regardless of whether the state publishes the same legal material in another format.
>
> As a matter of courtesy to the user of electronic legal material, if the electronic version is not designated as official, the state should include information that displays with the legal material that explains the source of or the procedure by which the public can obtain a copy of the official version of the legal material.
>
> Where the legal material is published only in an electronic format, the official publisher is required to designate as official the electronic format. This is a common sense requirement; if legal material is available from the state government in one version only, it follows that that version must be official.

Section 5. Authentication of Official Electronic Record

An official publisher of legal material in an electronic record that is designated as official under Section 4 shall authenticate the record. To authenticate an electronic record, the publisher shall provide a method for a user to determine that the record received by the user from the publisher is unaltered from the official record published by the publisher.

Source: New.

COMMENT

The publisher is required to provide a method by which the user can determine whether the record received from the publisher is unaltered from the official record published by the publisher. Other states and other countries have begun to adopt methods of authentication. The United States Government Printing Office provides official authenticated legal materials using digital signatures, as do Arkansas and Delaware. Utah has a somewhat more complicated system that requires more effort on the part of the user and, as such, might be considered less user-friendly. Regardless of the method used, the Act requires that the official publisher designate a "baseline" copy of all published legal material that constitutes the definitive document against which all others are compared for purposes of authentication.

As the ULC Report explains, in the Comment to Section 5,

> a state should make its official legal material available in a trustworthy form and citizens should be able to ascertain the trustworthiness of electronic official legal material. Reliable and accurate government legal material is necessary to allow those who use the information to make informed decisions based on it. The UELMA supports governments in fulfilling their obligations to provide trustworthy legal information so that citizens may participate knowledgeably in their own governance. The act also provides assurances to the legal community that the legal material it needs are accurate and reliable.
>
> This act guides a state in implementing both policies. The intent of this act is to be technology-neutral, leaving it to the enacting state to choose its preferred technology for authentication of legal material in an electronic record from among the options available. The technology-neutral approach also allows the state to change technologies when necessary or desirable.
>
> Authentication of electronic legal documents is an issue of both national and worldwide concern. Numerous governments and organizations are beginning to authenticate legal material and develop best practices. As of March, 2011, there are several U.S. jurisdictions in which legal material in an electronic record is being authenticated. Their practice offers guidance on specific technologies. For example, the United States Government Printing office provides official, authenticated Public Laws and other legal material using digital signatures (see http://www.gpoaccess.gov/authentication/faq.html#1)...
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> * * *
>
> The Hague Conference on Private International Law, a 72-member inter-governmental organization that develops multilateral legal instruments, has developed a best practices document requiring authentication of its official electronic legal materials. The "Guiding Principles to be Considered in Developing a Future Instrument," begun in 2008, includes principles for Integrity and Authoritativeness that state, in part:
>
> > 4. State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form.
> >
> > 5. State Parties are encouraged to take all reasonable measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness).
>
> These Principles, when completed and adopted, will apply to the development of all instruments coming from the Hague Conference, and the principles will become standards for organizations and jurisdictions worldwide. This act adds to these emerging standards by approaching the issue from an outcomes-based perspective…

California's Office of Legislative Counsel, the Minnesota Historical Society and Minnesota's Office of the Revisor of Statutes, after working together, published a report in December in 2011 regarding the various types of authentication methods as well as the pricing (estimated) for certain methods of authentication.

Various states have already begun to authenticate legal material by using various methods of authentication. Arkansas publishes its Appellate Opinions in electronic format with Digital Signatures. Delaware provides an electronic version of its Administrative Rules also using Digital Signatures. Indiana publishes its Administrative Code in electronic format with a Certificate of Authenticity. Utah authenticates its Administrative Code using hash value.

Secure Websites, Document Hashes, Digital Signatures, Proprietary Solutions and Visual Signatures are the current available technologies that can help authenticate as well as protect the legal material that is available electronically.

Secure websites are websites that use security technology such as, HTTPS, TSL/SSL, and digital certificates, to show that a website is what it claims to be. It provides the user with confidence that all that is being displayed on the site is authenticate.

Document Hashes are cryptographic functions that create a 'hash code' for a specific selected document. Hash codes are similar to a fingerprint for an individual document. If a document changes, so does the hash code. There are various Algorithms that can be used to verify document integrity ranging from the most common, MD5, to the most currently used, SHA-1.

Digital Signatures add another level of protection to the hashes that are created. These signatures add the signer's identity is a way that is safe and will authenticate the document. The identity is "encapsulated in an X.509 standard digital certificate, making the process open and standard." This type of authentication technology comes encrypted with a 'private key', in which only the signer will have access to the key, should the signer chose to make changes to the document. The private key is to be kept in a secure manner to ensure that no unauthorized changes will take place without the signer's consent. There is also a public key that can be used by the person viewing the file to verify that the document has not been altered in any way.

Propriety solutions can be purchased from vendors who already have a specific solution to authenticating legal material. Some of these vendors include: AbsoluteProof from Surety, ProofMark by ProofSpace, and TruSeal from Tru Data Integrity (a United Kingdom company).

Visual Signatures are scanned stamps, seals, or scanned signatures that can be placed on PDF files. Unlike digital signatures, visual signatures are physically placed directly on the document by the publisher before the documents are scanned into the specific electronic format chosen by the publisher. Virtually, any document can be scanned to be made into a PDF making it easier to be able to authenticate legal material in an electronic format.

California's Office of Legislative Services recommends that a legislative body should choose a combination of authentication technologies to create the best authentication method for their legal material. Reliance on a single method can expose a governmental entity to weaknesses in that particular method and therefore compromise the integrity of the document. Having a PDF file on a secure website perhaps may be the least expensive method, but the legislative body may be compromising the security of the file. If a PDF is created with a visible or digital signature in which it is posted on a secure website with extra methods of security, this combination may perhaps be the most expensive. The NJLRC is sensitive to the need for the Legislature to consider security and cost factors before making any determination regarding authentication solutions.

Section 6. Effect of Authentication

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

b. If another state has adopted a law substantially similar to this [act], legal material in an electronic record that is designated as official and authenticated by the official publisher in that state is presumed to be an accurate copy of the legal material.

c. A party contesting the authentication of legal material in an electronic record authenticated under Section 5 has the burden of proving by a preponderance of the evidence that the record is not authentic.

Source: New.

COMMENT

An authenticated record is presumed to be an accurate copy in this state or in another state that adopts a substantially similar law and that a party contesting the authentication of legal material has the burden of proving by a preponderance of the evidence that the record is not authentic.

As the ULC Report explains, in the Comment to Section 6, the "intent of this act is to provide the end-user of electronic legal material with a presumption that authenticated legal material is accurate. The act extends the same presumption to authenticated electronic legal material that is provided to legal material published in a book, and results in the same shift in the burden of proof as occurs when a party questions the accuracy of the print legal material. This is the legal outcome of authentication."

The ULC Report also explains that the

> act does not affect or supersede any rules of evidence, and leaves further evidentiary effect to existing state law and court rules. The presumption that authenticated electronic legal material is an accurate copy is not determinative of any criteria a court may wish to establish regarding admissibility and reliability of electronic legal material…
>
> Authentication provides only a presumption of accuracy, and a party disputing the accuracy of legal material in an authenticated electronic record can offer proof as to its inaccuracy. Authentication of an electronic record provides the same level of assurance of accuracy of the electronic record that publication in a printed book provides…
>
> This act does not affect the practice of certification, and courts retain discretion to require a certified copy to meet a particular evidentiary standard. Certification is a long-standing practice in which an official publisher reviews a printed document and adds a notarization or other verification that the document is an accurate copy of the original.
>
> The act does not require electronic legal material from another state to be authenticated for use in the enacting state. However, if another state has adopted this act, the same presumption of accuracy applies to its authenticated electronic legal material. Widespread adoption of this act will further the recognition and use of electronic legal material.

With regard to the status of the UELMA in other states, in Hawaii, the UELMA bill is pending in the House where it scheduled for a third reading, while in Massachusetts, the bill was introduced but it has yet to gain a sponsor and was referred to the Joint Committee on the Judiciary.

Section 7. Preservation and Security of Legal Material in Official Electronic Record

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

b. If legal material is preserved under subsection (a) in an electronic record, the official publisher shall:

(1) ensure the integrity of the record;

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

(3) ensure the continuing usability of the material.

Source: New.

COMMENT

The official publisher is required to provide for the preservation and security of the record in an electronic form or in some other form. If the material is preserved in an electronic record, the official publisher has a responsibility to ensure its integrity, provide for backup and disaster recovery and ensure the continuing usability of the record.

As the ULC Report explains, in the Comment to Section 7, "[l]egal material retains its value regardless of whether it is currently in effect. This includes legal material that is subsequently amended or repealed, as happens with statutes, as well as legal material such as cases that may be reversed or overruled. Legal material does not cease to be legal material with the passage of time. For example, the outcome of today's lawsuit may depend on rights or obligations created by yesterday's statutes or regulations."

The Report explains that "[r]esearchers need historical as well as current legal material to understand the development of legal doctrine and predict its future course. Legal material must be saved and protected—preserved—to allow for future use."

The ULC Report makes it clear that

> Enacting states are given discretion to decide what electronic legal material must be preserved. This is done through the definition of legal material in Section 2. Section 7 requires that any legal material included in the Section 2 definitions and designated as official under section 4 must be preserved. The preservation requirement is intended to cover all materials typically published with the defined legal material. For example, state session laws usually include lists of legislators and state officials, memorials, proposed or final state constitutional amendments, and resolutions, all of which should be preserved along with the legislative enactments.
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> The UELMA does not address the measures taken by states to secure their internal information, prior to the point of official publication. This act applies only to legal material that has been officially published and thereby made available to the public. Section 7 (a) requires that an official publisher provide for the preservation and security of electronic legal material designated as official, in either electronic or non-electronic form. This gives states the flexibility to preserve electronic legal material in a print format or in an electronic format. Regardless of the method chosen for preserving legal material, the official publisher's practices should be carried out in accordance with existing public records and records management laws.
>
> If legal material is preserved in print form, procedures to do so securely are well-established and are therefore not specified in the act. Traditionally, multiple copies of law books have been maintained by several libraries in diverse geographic locations. This method of preservation and security can be replicated for electronic legal material by printing multiple copies and distributing them in the same manner as books. Many states have an official state archivist, whose duties include preserving copies of important documents such as legal material and who may be able to provide assistance in preserving electronic legal material.
>
> If legal material is preserved electronically, however, Section 7 (b) of the act requires certain outcomes. Electronic records must be securely stored to ensure their integrity. In addition to other possible security measures, best practices for secure storage of electronic records call for the maintenance of multiple copies that are geographically and administratively separated. As with preservation in print form, the existence of multiple electronic copies maximizes the possibility that at least one copy of important records will remain available, even after a natural disaster or other emergency.
>
> To maintain security over time, backup copies of electronic records must be made periodically. A backup copy provides an identical version of an electronic record that is usable in case the original is lost or unusable. The backup process may be incremental, essentially tracking all changes to the original, or a continuous backing up of the entire system that saves the complete text of each version, among other methods. Whatever method the state chooses must back-up the original material plus subsequent changes; a changed record becomes a new record with content that must also be backed-up. Legal material is continually updated; states must develop systems that recognize the dynamic nature of legal material and provide for appropriate preservation.
>
> Preservation requires that the electronic records be migrated to new storage media from time to time. Just as cassette tapes were replaced by CD-ROMs which were then replaced by digital music formats, storage media for electronic records has and will continue to change over time. While the nature of new

technologies is not known at the present time, the fact that new technologies will be developed is a certainty. Costs of storage media are decreasing rapidly as the marketplace produces new products and methods. The anticipation of the Drafting Committee is that preservation of electronic records will be cost neutral when compared with the current system of storing tangible legal material.

In migrating to new storage media, the official publisher should preserve the legally significant formatting of electronic legal material. Legal material is often complex in organization and presentation. The formatting of the legal material, including italicization, indentation, numbering, bold face fonts, and internal subdivisions and subsections, can be significant. Hierarchies are defined and priorities are established, for example, by formatting, and legislative intent is made clear.

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

Title 47 of the New Jersey statutes provides guidance regarding the preservation aspect of records. N.J.S. 47:2-4 states, in part, that the public office director "shall examine into the condition of the records, books, pamphlets, documents, manuscripts, archives, maps and papers, now or hereafter kept, filed or recorded in the several public offices of every county or municipality, or required by law to be kept by any public body, board, institution or society created under any law of the state in any county or municipality."

Title 15 of N.J. Administrative Code, Chapter 3 Records and Retention (N.J.A.C. 15:3-1.4) states that: "The Division of Archives and Records Management shall oversee and examine the condition of books, papers, maps, documents, archives, manuscripts, papers kept, in file or recorded in other agencies. They are also in charge of restoring and preserving the material in the actions they follow in regards to the laws that are placed before them."

While the New Jersey Statutes and the New Jersey Administrative Code contain standards and rules pertaining to preserving public records, neither contains detailed information regarding the preservation of electronic records. The Uniform Electronics Transactions Act (UETA), enacted in New Jersey in 2011, is specifically designed to protect electronic transactions as well as preserving electronic records. *N.J.S.* 12A:12-23 states that "an electronic record, to be capable of retention by the recipient at the time of receipt, must be capable of being retained and accurately reproduced for later reference by all persons who are entitled to retain the record." The UETA also establishes provisions in which each government agency will be able to determine whether to retain or create regular records into electronic ones. Government agencies are also charged with the responsibility to "control processes and procedures appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality and auditability of electronic records" *N.J.S.* 12A:12-18.

The process of preserving and securing legal material would depend on the type of authentication methods used. It would likely involve running routine website updates in order to publish additional legal material, securely uploading files, and correcting any mistakes that may be present.

In cases of natural or man-made disasters, the Administrative Code outlines certain steps that an entity must take in order to apply for records recovery grants. N.J.A.C. 15:3:8 provides considerable detail explaining what eligible costs are acceptable, how to apply for the grant and what criteria will be considered when awarding the grant. The records recovery grant focuses on paper records, photography, and microfilm. Electronic legal materials are not specifically mentioned in N.J.A.C. 15;3:8.

In a 2006 circulating letter from the Office of Management and Budget (OMB) within the Department of the Treasury sent to directors of Administration, the OMB explains the new procedures for the review and approval of all proposals "new automated records Management/storage systems and related services intended to supplement or replace paper-based records systems." This specifically targeting purchased automated records management/ storage systems and services regardless of where the funding came from.

Automated records management/storage systems include but are not limited to: computerized indexing of record images, retrieval of record images, Internet-based filing/record retrieval, e-mail archive systems, and records management systems or other combinations technological platforms such as these.

The following agencies share responsibility for the reviewing/approving process of automated record systems/services proposals:

•The Division of Archives and Records Management

•The Division of Revenue

•Office of Information Technology

•Office of Management and Budget

Section 8. Public Access to Legal Material in Official Electronic Record

An official publisher of legal material in an electronic record that is required to be preserved under Section 7 shall ensure that the material is reasonably available for use by the public on a permanent basis.

Source: New.

COMMENT

The publisher of legal material in an electronic record shall require that the material is reasonably available to the public on a permanent basis. "Reasonably available" does not mean 24/7 access, and may be limited by the state's determination regarding reasonableness, but that access to the material must be offered permanently (in perpetuity).

The ULC Report states, in the Comment to Section 8, "[o]ur democratic system of government depends on an informed citizenry. Legal material includes information essential to all citizens in a democracy, whether the legal material is effective currently, has been repealed or overruled, or is of historical value only. To exercise their rights to participate in our democracy, citizens must have reasonable access to all legal material."

The Report also says that "[p]ermanent public access to official electronic legal material allows citizens to stay informed of legal developments and carry out their democratic responsibilities." In addition, the Report suggests that

> Legal material preserved under this act must be "reasonably available" to the general public. Reasonable availability does not necessarily mean that the information must be accessible around the clock, every day of the year. An enacting state has discretion to decide what is reasonable, which should be determined in a manner consistent with other state practice…Reasonable availability may mean that the legal material can be used during business hours at publicly accessible locations, such as designated state offices, public libraries, a state repository or archive, or similar location.
>
> Access to preserved electronic legal material may be limited by the state's determination of reasonableness, but access must be offered permanently. That is, the preserved electronic legal material must remain available in perpetuity. This requirement makes electronic legal material comparable to print legal material, which is stored on a permanent basis in libraries, archives, and offices.
>
> …In order to provide for maximum flexibility, and recognizing economic realities, however, the act does not address the issue of cost for access to electronic legal material. The result is that providing free access or charging reasonable fees for access to electronic legal material is a decision left up to the states.

Section 9. Standards

In implementing this [act], an official publisher of legal material in an electronic record shall consider:

a. standards and practices of other jurisdictions;

b. the most recent standards regarding authentication of, preservation and security of, and public access to, legal material in an electronic record and other electronic records, as promulgated by national standard-setting bodies;

c. the needs of users of legal material in an electronic record;

d. the views of governmental officials and entities and other interested persons; and

e. to the extent practicable, methods and technologies for the authentication of, preservation and security of, and public access to, legal material which are compatible with the methods and technologies used by other official publishers in this state and in other states that have adopted a law substantially similar to this [act].

Source: New.

COMMENT

An official publisher of legal materials is required to consider standards and practices in use both inside and outside of his or her jurisdiction.

The ULC Report states, in the Comment to Section 9, that as "private sector organizations, government agencies, and international organizations tackle these issues, their work may offer guidance to states as this act is implemented on an on-going basis. Like many other technology-related procedures, standards and best practices for management of electronic records are in a state of development and refinement. For example, appropriate information security is a key element of the authentication process, and security standards are currently being developed." The Report encourages each enacting state "to consider a single system for authentication of, preservation and security of, and public access to its legal material. A single system will lead to financial and personnel efficiencies in implementation and maintenance, and avoid confusion on the part of the users. While each enacting state will determine its own practices, states are encouraged to communicate, coordinate, and collaborate in the development of authentication, preservation, and permanent access standards."

Currently, the Administrative Code, rather than the statutes, provides the detailed information regarding the preservation and storage of public records. The Code establishes minimum standards. These standards, however, are geared toward the preservation and storage of paper records, micro films, and image processes. For example, N.J.A.C. 15:3-2.7 establishes the following standards for paper records:

1. pH. Minimum pH of 7.5 in accordance with the cold extraction method described in Technical Association of the Pulp and Paper Industry, T 509***o***m-83, Hydrogen Ion Concentration (pH) of Paper Extracts - Cold Extraction Method;

2. Alkaline reserve. Minimum alkaline reserve equivalent to two percent calcium carbonate based on oven dry weight of the paper;

3. Paper stock. The paper shall include no ground wood or unbleached pulp; and

4. Paper weight. Minimum paper weight of 24 pound is required of records being held or reproduced in book form for permanent retention or use in a State or local government agency.

Presently, it does not appear that there are standards specifically directed toward the preservation of electronic material with the exception of e-mail messages that meet the criteria for public records as passed by the Open Public Records Act as mentioned in a Circulating letter from DARM to all state and local government agencies. As stated in the letter: "retention or disposition of e-mail messages must be related to the information they contain or the purpose they serve. The content, transactional information, and any attachments associated with the message are considered records (if they meet the criteria a public record in N.J.S. 47:3-16). The content of e-mail messages may vary considerably, and therefore, this content must be evaluated to determine the length of time the message must be retained." DARM suggests that email that is retained as public records depends on the information they contain and the purpose they serve. This goes for all information in the e-mail, all of the attachments, as well as any transactional information that are in the e-mail as well. Content must be evaluated to determine how long the e-mail will be kept as a public record. For example, public correspondence as well as non-governmental publications can be deleted and not preserved unless there is a special circumstance that arises. Official recorded e-mail messages are divided in the following categories: transient documents, intermediate documents, and permanent documents.

Transient Documents: "…include telephone messages (such as "While You Were Out" notes), drafts, and other documents that serve to convey information of temporary importance in lieu of oral

communication. E-mail messages of a similar nature should be retained until they are no longer of administrative value and then destroyed."

Intermediate documents: these types of e-mail have more significant administrative, fiscal, and /or legal value which includes minutes of an agency staff meetings, memos, monthly and weekly reports, as well as general correspondences from one individual to a company, etc.

Permanent Documents: include executive correspondences , department procedures and guidelines, and minutes of board and commission meetings. Not all e-mail messages will fall under this category but those e-mail messages that are retained should be revisited in order to keep follow the guidelines and standards set forth by State Archives and other agencies.

There do not currently appear to be any standards that address other electronic records, such as websites and documents that may exist only in electronic form. Staff will continue research in this regard.

Section 10. Uniformity of Application and Construction

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: New.

COMMENT

This language is identical to the ULC source language.

Section 11. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Source: New.

COMMENT

This language is identical to the ULC source language.

Section 12. Effective Date

This [act] takes effect . . . .

Source: New.

COMMENT

This language is identical to the ULC source language.