

State Primary Law Materials in a Digital Era

Where Do We Go from Here?


By Ruth S. Stevens and Jane Edwards

Introduction

In 2006, the American Association of Law Libraries (AALL) conducted a state-by-state survey to evaluate the credibility of electronic online legal resources.¹ The survey sought to answer the ultimate question of “[h]ow trustworthy are state-level primary legal resources on the Web?”² To answer this question, the researchers looked at six different sources of law: state administrative codes and registers, state statutes and session laws, and state high and intermediate appellate court opinions.³ Librarians from all over the country were recruited to gather data for the survey, and in 2007, the final report, known as the *State-by-State Report on Authentication of Online Legal Resources (State-by-State Report)*, was published. The report included six key findings, but the most significant discovery was the answer to the question of “[h]ow trustworthy are state-level primary legal resources on the Web?” Surprisingly, the researchers found that most state online primary legal resources cannot be relied on as official and authentic laws of the state.⁴

The impact of these findings may be difficult to appreciate without further explanation of the terms “official” and “authentic.” Most attorneys are well acquainted with the concept of official legal resources. “Official status” is a concept that has been ingrained in lawyers from the first day of legal research and writing class right up through current practice. According to the *State-by-State Report*, official means that a resource is, “governmentally mandated or approved by statute or rule.”⁵ Describing a resource as official inherently assumes a certain level of trustworthiness and authenticity, regardless of format;⁶ however, “the very concept of an *official* legal resource fits print much more easily than online sources.”⁷ Print provides a fixed medium, and for years lawyers have, unquestioningly, relied on print versions as representations of the official text of laws.

While the distinction between official and unofficial sources of law is part of lawyers’ common knowledge, the concept of authenticity, as used in this context, is probably new to most



OFFICIAL
STATUS



Fast Facts

It is essential that legal researchers be able to access earlier versions of a law and that long-term access to all versions of primary laws is available.

The American Association of Law Libraries *State-by-State Report on Authentication of Online Legal Resources* is a “timely wake-up call for work that needs to be done to ensure the integrity and trustworthiness of electronically transmitted and maintained legal documents and information.”

Members of the legal community, as well as members of the general public, have an important interest in ensuring that digital versions of the laws of their state are accessible, trustworthy, and preserved for the future.

lawyers. The *State-by-State Report* defines authenticity of a primary legal source as follows:

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, the process associated with ensuring that the text is complete and unaltered when compared with that of the content originator. An *authentic* text is able to be *authenticated*, which means that the particular text in question can be validated, ensuring that it is what it claims to be.⁸

This definition parallels closely the definition of authenticity under the Michigan Rules of Evidence as “evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁹ It is relatively easy to verify a print source as being authentic. (The possibility of a rogue publisher printing altered versions of official reporters and sneaking them into every firm, government, and law school library seems very remote.) It is not as easy to verify that an online source is authentic unless the government has taken affirmative steps to secure the information and has provided a certificate of its authenticity.

One might ask why attorneys should be concerned about the trustworthiness of online legal sources as long as the print sources are still available. There are several answers to this question. First, online sources appear to be trustworthy when they are on the website of a government agency, but appearances can be deceiving. In some cases, the content of the online source is different from the print source, even though both sources may have the same title.¹⁰ In addition, online sources may not be produced using the same standards of quality and authenticity as those applied to the printing of official versions. Moreover, it is often not readily apparent whether the online source is intended to have the same content and level of authenticity as the official print source. Thus, researchers may rely on online sources as being official and authentic when, in fact, they are not.

If states turn to providing online-only access to their primary laws, as some have already done, then the issues of preservation of and permanent access to the law also arise. The outcome of a case may hinge on the wording of a law that has since been amended. It is essential that legal researchers be able to access

earlier versions of a law and that long-term access to all versions of primary laws is available. This issue must be addressed up front, before previous versions of a law have “disappeared.” As Professor Robert Berring notes, “[I]f we leap to digital information without providing a reliable infrastructure that authenticates and preserves it, we will be making a huge mistake. It will have to be corrected in the future, further down the mountain, when the snowball has become so big that it begins to cause serious problems.”¹¹

Academics are not the only ones concerned about these issues. Judge Herbert B. Dixon, Jr., a past chair of the National Conference of State Trial Judges and a co-chair of the American Bar Association Judicial Division Court Technology Committee, refers to the AALL *State-by-State Report* as a “timely wake-up call for work that needs to be done to ensure the integrity and trustworthiness of electronically transmitted and maintained legal documents and information.”¹² Judge Dixon notes that attorneys are keenly aware of the ease with which electronic documents can be altered, either as a result of neglect or as a result of intentional tampering. The issues of authority, preservation, and access to digitally stored information exist in many contexts in addition to access to primary law materials, including electronic court filings, use of electronic evidence, and exchange of electronic discovery materials. According to Judge Dixon, attorneys and judges need to be concerned about preserving the integrity of all these types of materials. Yet, he reports that even publishers of official online versions of primary law materials have not established procedures and safeguards to give the online versions the same reliability as their print publications.

Michigan Laws: Comparison of Status of Print and Online Versions of Primary Laws

Historically, in Michigan, as in other states, the responsibility for publishing laws rests with the branch of government that creates the law, and each branch adopts its own policies and procedures for providing online access to its laws within the overall framework provided by state statutes. The lack of a coordinated approach for providing online access to laws is one of the barriers to implementation of effective authentication procedures; each branch of government must work with its own limited resources to address the technical and practical issues involved with authenticating its online laws.¹³ The patchwork result compounds the problems for researchers who must deal with an array of online legal materials, some of which are official and some of which are not.

In Michigan, the print copies of the Michigan Appeals Reports and the Michigan Reports are the official versions of our caselaw. Both reports are produced under authority of Michigan laws that provide for the publication of Michigan Court of Appeals and

Michigan Supreme Court decisions.¹⁴ MCL 26.2 directs the state to solicit bids for the publication of Michigan Supreme Court opinions. The Reporter of Decisions is required to furnish the winning bidder copies of the decisions with the Reporter's "syllabus... brief statement of the case, and a proper index and digest of such decisions."¹⁵ Over time, different companies may be awarded the publishing contract, but this does not affect the official status of the published opinions, and attorneys are used to relying on both the Michigan Appeals Reports and the Michigan Reports as authoritative sources for Michigan appellate court opinions. The Michigan Uniform System of Citation also require citation to these official sources in opinions written by the Michigan Supreme Court and Michigan Court of Appeals.¹⁶

The online Michigan Court of Appeals and Michigan Supreme Court decisions posted on the Michigan Courts website¹⁷ do not meet either of the two tests of "official" status described in the *State-by-State Report*. Unlike the print versions of Michigan opinions, the opinions posted on the Michigan Courts website are not "approved by statute or rule." Michigan statutes and court rules are silent on the issue of electronic publication of cases. The second part of the *State-by-State Report's* definition of an "official" source refers to a source that is "governmentally mandated." One could argue that the phrase "governmentally mandated" means simply created by virtue of government action. Using this expansive definition, the online versions of Michigan laws could be considered to be official, because they are formatted and posted online by the various branches of state government or their designees. However, this broad interpretation of what is meant by governmentally mandated does not stand up to scrutiny, because, if it is used, virtually any primary laws posted as a result of action by a government body would be considered official. The key inquiry is whether the government body deems the online source to be official, not just whether the government posts online versions of its laws as a convenience to its citizens.

This approach is consistent with the approach to this issue taken by the Association of Reporters of Judicial Decisions (ARJD). Under the ARJD's Statement of Principles: "Official" On-Line Documents (ARJD Principles),¹⁸ the entity that creates a source of law has the final say on what versions of the law are official. The ARJD Principles clearly recognize that electronic versions of opinions that are created pursuant to statute or court rule are official, but they expand the definition of "official" to also include any


medium of publication that the issuing court designates as official. The caveat is that the court must take the affirmative step of designating the source as official. It is not enough that the court simply makes the source available on the Internet.

In spite of the lack of a statutory mandate, language on the Michigan Courts website appears to designate some of the online materials as official. Access to published court opinions decided before January 2001 is provided through a link to the "Michigan Official Historical Reports."¹⁹ These reports are provided by Thomson-West. Although the link to these reports uses the term "official," the Michigan courts do not consider this source as official.²⁰ The content of the online "Michigan Official Historical Reports" is also different from the content of the official print opinions. The print decisions contain all the editorial features added by the Reporter of Decisions, including a syllabus, headnotes, and citation information. The online versions have only the text of the opinion. They are essentially in the format of slip opinions.

The existence of parallel print and online sources for Michigan cases that have different formats and content is an example of the issues that can arise when states put unofficial versions of their laws on the Internet. On the one hand, the state is serving an important public function by making its laws more accessible. On the other hand, the dual versions can lead an inattentive or uninformed researcher to rely on a version that is incomplete or inaccurate.

Michigan courts have attempted to address this potential problem in two ways. First, the website with the Michigan Supreme Court and Michigan Court of Appeals opinions has a disclaimer stating that, "The Court does not guarantee that the information is accurate, current or complete, though the Court strives to meet those standards."²¹ The courts have also created a two-step system for posting decisions on the Internet. "Unofficial" versions of decisions are posted as they are released, but before final editing has been completed. After the Office of the Editor has made final corrections, the court forwards the opinion to the publisher of the official reporters, and this final version of the opinion is posted to the court website with a "book" symbol.²² This symbol signifies that the online version is the same as the official version that is sent to the publisher of the print reporters. As with the "Official Historical Reports," however, the online version does not contain a syllabus, headnotes, and official page numbers.

There is more clarity regarding the status of Michigan administrative regulations. In 2003, the Michigan legislature passed



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an amendment to the Michigan Administrative Procedures Act directing the Office of Regulatory Reform (now part of the State Office of Administrative Hearings and Rules (SOAHR)) to publish the Michigan Register, the Michigan Administrative Code, and the Michigan Administrative Code Supplement on its website.²³ The amendment further designates the web versions of these publications as the official versions. The SOAHR is no longer required to publish print versions of these sources.

Determining the official status of Michigan statutory law is fairly straightforward. Like caselaw, the print versions of the Michigan Compiled Laws (MCL) and Michigan local and public acts are deemed the official sources of statutory law. The authority for publication of the Michigan local and public acts is provided for in the Michigan Constitution and requires that the legislature publish all laws in a book form at the end of every legislative session.²⁴ This constitutional provision is carried out by the Legislative Service Bureau, which is given ultimate responsibility for the publication of the local and public acts.²⁵ The authority for publication of the MCL is also provided for in the Michigan Constitution²⁶ and, while the Constitution requires that the local and public acts be published at the end of every legislative session, there is no publication schedule set for the MCL. Instead, the decision to publish a compilation is left to the discretion of the legislature.²⁷

The local and public acts and the MCL are also published in electronic form on the Michigan legislature website; however, these versions of the acts and compiled laws are not considered official. The website makes this very clear by including a disclaimer that states: “The information obtained from this site is not intended to replace official versions...and is subject to revision. The Legislature presents this information, without warranties, express or implied, regarding the accuracy of the information, timeliness, or completeness.”²⁸

The fact that the sources on the website are not considered official would not be a significant issue if there were a current print version of the official code. As mentioned above, publication of the MCL is left to the discretion of the legislature, and a print version of the MCL has not been published since 1979. The only options available for reference or citation purposes are the Michigan legislature website or commercial publications, such as the print annotated codes or Westlaw and Lexis. While these resources are very reputable, they do not carry the authority that an official resource does.

The other problem with publishing the MCL exclusively in an electronic format is that this version becomes the only source of the MCL for most people, including some attorneys. The Michigan Legislative Council, which, along with the Legislative Services Bureau, is responsible for publishing the print and online versions of the MCL, considers the electronic version an “aid to the public.”²⁹ As such, the online version of the MCL is inadequate unless it is verified against an official version of the public acts, and given the complexity and difficulty of accessing the public acts, it is unrealistic to expect the average citizen or even a conscientious attorney to consult the public acts to verify the law.

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It's Official, But is it Authentic?

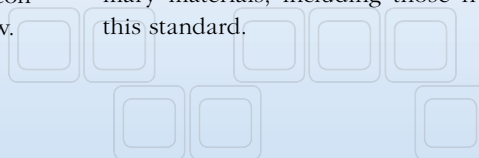
Even if an electronic source of primary law is considered official, a researcher who wishes to use the source must inquire further to make sure that the source is authentic. The ARJD Principles recommend that there be only one official copy of a source so that, if discrepancies arise, there is only one source to which to go to resolve them. Arkansas takes this approach in its statutes by stating explicitly that, if there is a discrepancy between a print and online version of a law, the language of the print version of the law is controlling.³⁰

Electronic sources of primary law have the same vulnerabilities as other types of electronic information. At the most basic level, errors and inaccuracy can be introduced through human error in entering, storing, or transmitting the data. At the other extreme, electronic errors and omissions can be introduced by intentional tampering. Attorneys deal with the issue of authenticity of electronic sources in many other contexts, such as introduction of electronic evidence and exchange of electronic discovery materials. As is with these sources, the issues of authenticity and accuracy of electronic primary law sources is not purely theoretical. For example, in 2001, attorneys in Arkansas were presented with the problem of a critical omission from the electronic version of a case published by a major legal publisher.³¹ This serves as an example of the need for strong safeguards to protect the integrity of digital legal sources.

Protecting the security of electronic versions of primary laws is also of increasing importance as some states discontinue print publications and use electronic versions as the only publicly available versions of their official laws, as Michigan has done with its administrative regulations. There are different approaches to protecting the authenticity of public documents, but, in general:

[A]n authentic text will bear a certificate or mark that conveys information as to its certification, so that the text is authenticated. The standard methods of authentication include encryption, especially digital signatures and public key infrastructure, or similar technologies.³²

The *State-by-State Report* shows that, currently, state online primary materials, including those from Michigan, do not meet this standard.



Current Efforts to Address the Issue of Authenticity of Legal Materials

In 2007, the AALL organized a National Summit on Authentication of Digital Legal Information to address the issues raised in the *State-by-State Report*.³³ Fifty delegates from the judiciary, the legal community, state governments, and interested organizations participated in the summit. The primary goal of the summit was to bring in national leaders to examine the issues associated with authenticity and to explore “legal and technological solutions to ensure that state online legal resources are authenticated and trustworthy.”³⁴

While the primary goal of the summit was to examine the issues associated with authenticity, a secondary goal was to produce a number of follow-up action items. One of the action items to emerge from the summit was to pursue model legislation on the issue of authenticity. While a few states are making progress in terms of authenticity and designating online resources as official, the progress is extremely slow and there remains much inconsistency not only among the states, but also among governmental entities within the states. As the summit attendees recognized, without some type of model legislation or standard rules on authenticity, the trustworthiness of online state primary resources is undermined.

Summit speaker Michele Timmons, who serves as the Minnesota Revisor of Statutes and commissioner of the National Conference of Commissioners on Uniform State Laws (NCCUSL), was asked to submit a proposal to NCCUSL to form a study committee to explore the possibility of creating a uniform law or model act on digital authentication of state online legal resources.³⁵ Ms. Timmons submitted her proposal shortly after the summit in the summer of 2007, and in February 2008, NCCUSL approved the creation of a new Study Committee on Authentication of Legal Materials.

The official charge of the committee is to “investigate the need for and feasibility of drafting and enacting uniform state legislation providing for the authentication of state online legal materials and for the preservation of records of those materials.”³⁶ The committee was formed in August 2008 and has met via conference call four times since its creation.³⁷ The most recent meeting was held on March 23, 2009, and during this meeting the committee decided to recommend that a drafting committee be formed on this topic.³⁸ A report describing the study committee’s decision will be submitted in July 2009 to the NCCUSL Scope and Program Committee, which will then decide if a drafting committee should be formed.

Even if an electronic source of primary law is considered official, a researcher who wishes to use the source must inquire further to make sure that the source is authentic.

The study committee’s decision to recommend that a drafting committee be formed is the next step in standardizing the treatment of online legal resources. Providing states with model legislation will go a long way in ensuring the trustworthiness and integrity of online legal resources. While the proposal to create a drafting committee may end up being rejected, the study committee’s recommendation is indicative of the seriousness of this issue to the greater legal community.

If a drafting committee is formed, the committee’s work may take several years to produce a model law. In the meantime, the United States Government Printing Office (GPO) is implementing an authenticated digital system that enables the GPO to manage government information in a digital form.³⁹ This initiative, known as the Federal Digital System (FDSys), serves as an excellent authentication model for state governments and for the NCCUSL drafting committee.

The GPO’s FDSys is a groundbreaking digital system that will provide online access to original and authentic⁴⁰ legal materials from all three branches of the U.S. government. Information from the well-known GPO Access website is being migrated to the FDSys website on a collection-by-collection basis and is expected to be complete by mid-2009.⁴¹ The system is currently available in a beta version⁴² and includes bills, congressional documents, congressional hearings and reports, the Congressional Record, and the Federal Register.

What is so remarkable about the GPO’s FDSys is that it incorporates a formal system for authenticating online government documents that uses encryption, digital signatures, and public key infrastructure.⁴³ As previously discussed, 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.⁴⁴ Typically, an authentic text will bear a certificate or mark that communicates to the user that the text is authenticated.⁴⁵ In the case of the GPO, a Seal of Authenticity and a validation icon will be displayed on the pdf version of the document.⁴⁶ If the validation icon is a blue ribbon, the user can be assured that the certification is valid and that the document is authentic.⁴⁷

The GPO’s authentication system is still in its early stages, but it is currently being used to authenticate a number of government



documents such as the 2009 Budget of the United States, congressional bills introduced in the 111th and 110th Congresses, and public and private laws beginning with the 110th Congress.⁴⁸

Clearly, progress is being made toward the goal of authenticating online legal resources. The GPO's experience will be instructive as state governments create their own authentication systems, and if the NCCUSL drafting committee is approved, a model law will go a long way to establish much needed standards for authentication of online legal resources.

Conclusion

States have had the issue of providing electronic access to their laws thrust upon them as a result of the increasing demand for all types of online sources of information. Members of the legal community, as well as members of the general public, have an important interest in ensuring that digital versions of the laws of their state are accessible, trustworthy, and preserved for the future. Delay in addressing these issues will further compound the problem. Although gains have been made in Michigan in providing reliable access to primary laws, much remains to be done. Fortunately, models are being developed at the federal level and in other states that can help to guide Michigan as it addresses the issues presented by providing online access to its laws. ■



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FOOTNOTES

1. American Association of Law Libraries, *State-by-State Report on Authentication of Online Legal Resources* (2007) <http://www.aallnet.org/aallwash/authen_rprt/AuthenFinalReport.pdf>. All websites cited in this article were accessed May 26, 2009.
2. *Id.* at 3.
3. *Id.*
4. *Id.* at 7.
5. *Id.* at 8.
6. *Id.*
7. *Id.*

8. *Id.*
9. MRE 901(a).
10. See, e.g., Oddi, *Can you rely on the Indiana Code?: Part I*, 51 Res Gestae 20 (May 2008).
11. Berring, *Losing the law: A call to arms*, 10 Green Bag 2d 279, 281 (2007).
12. Dixon, Jr., *The lack of effort to ensure integrity and trustworthiness of online legal information and documents*, 46 Judges J (Summer 2007), available at <<http://www.aallnet.org/summit/TECHLackEffort.pdf>>.
13. See, e.g., Martin, *Reconfiguring law reports and the concept of precedent for a digital age*, 53 Vill L R 1, 43 (2008).
14. See MCL 26.1, *et seq.* (publication of Michigan Reports) and MCR 7.215 (publication of Michigan Court of Appeals decisions by Michigan Supreme Court reporter of decisions).
15. MCL 26.8.
16. Administrative Order No. 2006-3.
17. Michigan Courts, *Opinion Search Options* <<http://coa.courts.mi.gov/resources/opinions.htm>>.
18. Association of Reporters of Judicial Decisions, *Statement of principles: "Official" on-line documents* <http://arjd.washlaw.edu/ARJD_Statement%20of%20Principles_May2008.pdf>.
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20. E-mail from Danilo Anselmo, Michigan Reporter of Decisions, June 9, 2009.
21. Michigan Courts, *Disclaimer* <<http://coa.courts.mi.gov/court/disclaimer.htm>>.
22. Michigan Courts, *Opinion Search Options* <<http://coa.courts.mi.gov/resources/opinions.htm>>.
23. MCL 24.255 and MCL 24.259. See also Michigan Department of Labor, Energy & Economic Growth, *Overview of finding administrative code* <http://www.michigan.gov/dleg/0,1607,7-154-10576_35738_5698--,00.html>.
24. Const 1963, art 4, § 35.
25. MCL 24.2.
26. Const 1963, art 4, § 36.
27. *Id.*
28. Michigan legislature website <<http://www.legislature.mi.gov>>.
29. Conversation with Marge Martin, Michigan Legislative Council, March 4, 2009.
30. Ark Code 1-2-123.
31. See Sullivan, *The perils of online legal research: A caveat for diligent counsel*, 29 Am J Trial Advoc 81 (Summer 2005).
32. Germain, *Legal information management in a global and digital age: Revolution and tradition*, 35 Int'l Legal Info 134, 155 (Spring 2007).
33. AALL Leadership on Authentic Legal Information in the Digital Age <<http://www.aallnet.org/summit/>>.
34. *Id.*
35. Baish, *Washington Brief*, 11 AALL Spectrum 6 (July 2007), available at <http://www.aallnet.org/products/pub_sp0707/pub_sp0707_Wash.pdf>.
36. NCCUSL, *Study Committees* <<http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=1&tabid=40>>.
37. E-mail from Michele Timmons, March 10, 2009.
38. E-mail from Michele Timmons, March 26, 2009.
39. GPO, Federal Digital System <<http://www.gpo.gov/fdsys/search/home.action>>.
40. Since there are no standards for authenticating online legal resources, the term "authentic" as used by the GPO is a bit misleading. While the GPO is using several accepted techniques for authenticating its online sources, according to Mary Alice Baish, director, AALL Government Relations Office, they are missing several key authentication practices such as chain of custody information and certification that the document is what it purports to be.
41. GPO, Federal Digital System <<http://www.gpo.gov/projects/fdsys.htm>>.
42. GPO, Federal Digital System FDSys <<http://fdsys.gpo.gov/>>.
43. E-mail from Mary Alice Baish, February 24, 2009.
44. *State-by-State Report*, n 1 *supra* at 8.
45. Germain, n 32 *supra* at 155.
46. GPO Access, *Authentication: Frequently Asked Questions* <<http://www.gpoaccess.gov/authentication/faq.html>>.
47. *Id.*
48. GPO Access, *Authentication* <<http://www.gpoaccess.gov/authentication/index.html>>.