To: New Jersey Law Revision Commission  
From: Susan G. Thatch  
Re: Uniform Electronic Legal Material Act  
Date: April 9, 2015

MEMORANDUM

This Memorandum is intended to provide the Commission with additional information regarding the Uniform Electronic Legal Material Act ("UELMA") and its potential applicability to New Jersey law.

Introduction

The American Association of Law Libraries, the New Jersey Law Librarians Association and the American Bar Association promote adoption of UELMA. Liaisons from the Seton Hall Law School library and the Rutgers School of Law library asked that the Commission review the Act for possible introduction in New Jersey and enactment by the Legislature.

The Commission first considered UELMA in June 2012 and further discussed it in June 2013. While the Commission expressed reservations regarding the usefulness of UELMA in New Jersey, it refrained from issuing a Final Report and requested that Staff revisit this Uniform Act.

Background

Electronic legal materials provide unprecedented accessibility but remain both fragile and potentially ephemeral. The Federal government has made significant efforts at providing accessible and authenticated electronic materials, but has at times struggled with the vulnerability of electronic publications.\(^1\) States producing legal information in an electronic format must also consider the most secure and trustworthy method for producing these materials.

The Uniform Law Commission ("ULC") recognized that “[p]roviding information online is integral to the conduct of state government in the 21st century”\(^2\) and in 2011 released the UELMA to promote the authentication and preservation of these online materials.

In its basic form, UELMA is consists of the following components:

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• State entities are not mandated to publish their statutes, regulations, cases, opinions, etc. (“Legal Material”) electronically.
• If a state entity publishes its Legal Materials only electronically, the Electronic Material shall be designated “official” and must be (a) authenticated, (b) preserved and (c) secured.
• If a state entity publishes its Legal Materials in other official mediums, the Electronic Legal Material may be designated “official” and would then be required to be (a) authenticated, (b) preserved and (c) secured.
• The Act applies only to Legal Materials published after the legislation’s stated effective date.

UELMA leaves the choice of technologies for authentication and preservation to the states, but seeks to harmonize standards for acceptance of electronic legal material across jurisdictional boundaries. The ULC intended for UELMA to complement 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).

New Jersey

The State of New Jersey, via the websites of various State agencies, provides online access to an increasing amount of legal materials, as discussed below. The following information does not represent an exhaustive representation of every location at which one may find New Jersey legal material online, but only a collection of information based upon a preliminary examination of the website associated with the source or originator of the legal material discussed.

Executive Branch Materials:

New Jersey’s Office of Administrative Law’s (“OAL”) website provides links to the New Jersey Administrative Code and the New Jersey Register maintained by the legal research provider LexisNexis. While the LexisNexis banner proclaims to be the “Official Publisher of the New Jersey Administrative Code,” further terms of use stipulate that “this online version of the Code is not the official Code and may not include the most recent changes to a rule.”

The OAL’s website also provides a link to Rutgers School of Law – Newark’s research portal which purports to provide access to Administrative Law Decisions from 1997-present. The Rutgers’ homepage warns visitors:

Due to state budget cuts, the New Jersey Office of Administrative Law has temporarily ceased making new decisions available. It is our understanding that they will resume releasing decisions as soon as they are able.
The website does not state when the provision of new decisions ceased or whether they have been subsequently provided.

The Office of Administrative Law’s website also includes a link to “OAL Final Decisions and Orders (2014-Present).” This link provides decisions relating to Special Education, the NJ Higher Education Student Assistance Authority, the NJ DEP Spill Compensation Fund Arbitration, and the Child and Adult Food Care Program. It is unclear whether this is a complete database or whether it should be considered official.

It does appear that the OAL is making efforts towards greater online accessibility. Pursuant to P.L. 2013, c. 259 § 5, effective July 1, 2014, all agencies must post on their websites notifications, proposed rule summaries, and summaries of written or oral submissions concerning a proposed rule, in addition to the traditional publication in the New Jersey Register. To effectuate the new law’s requirements, the Office of Administrative Law has proposed new “Rules for Agency Rulemaking – Use of Electronic Technologies in Rulemaking.” The new rules would amend N.J.A.C. to require that each agency shall publish on its website “all final agency orders, decisions, and opinions, in accordance with N.J.S.A. 47:14A-1 et seq.”

Legislative Materials:

The New Jersey Legislature’s website provides access to searchable, complete text of New Jersey’s Constitution. The website also provides an inoperable link to the New Jersey State Library for the New Jersey Constitutional Convention Proceedings of 1947.

Pursuant to the requirements of N.J.S. 52:11-78, the Legislature’s website also links to an electronic database of “the most current available compilation of the official text of the statutes of New Jersey” as well as “the text of all chapter laws beginning with laws passed by the Legislature after . . . January 9, 1996.” The website provides no indication as to whether these databases should be considered official, and it has been suggested 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.”

Judicial Materials:

4 Id. at 2225.
The New Jersey judiciary makes decisions available on its website for a period of time ranging from 10 business days to six weeks, depending upon the judicial entity rendering the decision. After this posting period, the judicial materials are archived and accessible through the Rutgers Law Library – Newark’s website, as well as through commercial fee-based research engines.

The New Jersey Courts website does maintain a permanent, not all-inclusive database of certain case law relating to business practices, but clarifies that “[t]he availability of these opinions on this website does not constitute publication under New Jersey Rules of Court.” The relevant Rule of Court stipulates that the only authoritative and official source for appellate decisions is the official print reporters.

Previous Commission discussions about UELMA have noted that any requirements regarding judicial decisions may create Winberry concerns and potentially infringe upon the New Jersey Supreme Court’s exclusive authority over court administration. The New Jersey Courts and the Administrative Office of the Courts have historically established the rules regarding the publication of the court materials; the Commission may wish to consider whether the “judiciary has fully exercised its power with respect to the matter at issue.”

Jurisdictions adopting UELMA are split on whether judicial decisions are included within the definition of Legal Materials. Indeed, it appears that the four U.S. jurisdictions currently publishing authenticated judicial legal material have done so either through court initiative or court rule.

**Legislative Initiatives:**

The New Jersey Legislature recognizes the Internet’s role in promoting public accessibility and civic engagement. N.J.S. 52:14-20.1 provides that reports and publications

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10 Opinions of the New Jersey Supreme Court, the Appellate Division (published and unpublished from 2005), the Tax Court, and the Disciplinary Review Board are posted on the New Jersey Courts website for 10 business days. Published Trial Court opinions are available for two weeks, while unpublished Trial Court opinions are available for six weeks. Ethics Committee opinions are not available on the New Jersey Courts website but are linked to the archive maintained by Rutgers Law Library – Newark.


14 See N.J. Ct. RULE 1:36-2 (establishing publishing guidelines); see also New Jersey Courts, Supreme and Appellate Opinions, available at http://www.judiciary.state.nj.us/opinions/index.htm (last visited April 2, 2015) (noting that opinions will be available on NJ Court website for 10 days and thereafter accessed through Rutgers Newark Law School).


produced by the State or its agencies for the Governor, Legislature or public “shall be posted on the Internet in lieu of printing.” 17 In the current legislative session, approximately two dozen bills have been introduced which propose using the Internet’s power to achieve greater levels of government transparency. 18 Additionally, some Legislators view the Internet as a method of driving further fiscal efficiencies and would require state agencies to reduce costs through increased use of the Internet. 19

Assembly bill A3685 proposes amending New Jersey’s Open Public Records Act (“OPRA”) to provide that “the custodian of a government record shall make that record available to the public for inspection, examination, copying and printing at no charge by posting the government record, in a searchable format, on an Internet website maintained by, or made available to, the custodian.” 20 It is unclear how this proposed bill interacts with the enforcement mechanisms of OPRA, which provide for an identified record request, 21 an official response, 22 and imposes penalties when the record request is inappropriately withheld. 23

Other States

Twelve states have adopted UELMA; an additional four states have introduced it for consideration. Attached as an appendix is a brief summary of the legal materials covered by enacted and proposed versions of the Uniform Electronic Materials Act. No states enacting UELMA mandate that the official publishers publish electronically. Each state also takes a prospective view with an effective date determined by the legislature.

Analysis

UELMA presents a statutory framework for a narrow body of New Jersey law. As drafted, UELMA only immediately applies to those legal materials that are being published

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17 N.J.S.A. 52:14-20.1 also provides that an electronic and print copy of such reports or publications shall be submitted to the State Librarian.
18 These bills vary widely in the information they seek to make available online. By way of example, some of the bills contemplate the online publication of information regarding contract and grant data (AB 644), compensation paid to college presidents (AB 263), lists of individuals who have violated animal cruelty laws (AB 1613), and a fact sheet about bedbugs (AB 2583).
19 AB 2660 (2014) (requiring every state agency to review its operations to determine whether there are ways the agency could reduce costs through the use of the Internet to provide services and conduct public business).
20 A “government record” is defined as “any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1 (West).
21 N.J.S.A. 47:1A-5(g) (West).
22 N.J.S.A. 47:1A-5(i) (West).
23 N.J.S.A. 47:1A-11 (West).
The ULC’s primary concern seems to be the risks inherent in publishing and maintaining electronically published primary legal sources. It seeks to obviate those risks by mandating the authentication, security, and preservation of these primary legal sources.

UELMA does not affect State agencies that do not publish their legal materials in an electronic form. State agencies publishing both in print and electronic formats may designate the electronic version as official, but are not required to do so. Despite contributing to public accessibility, it is uncertain whether state agencies will designate their electronic legal materials as official if they will be then required to authenticate, preserve and secure these materials. However, UELMA does provide a framework for state agencies undeterred by these extra requirements to better serve public accessibility and establish a system for official electronic publication.

The public accessibility advanced by the Legislature and the authentication/preservation envisioned by UELMA are complementary concepts that have not been married by either UELMA or legislative initiatives to date. The Commission may wish to consider requiring the official electronic publication of select legal materials that should be authenticated, secured and preserved in accordance with UELMA.

Project Considerations

Scope of Project:

The Commission may wish to consider several approaches in advancing this project:

1. Consideration of UELMA’s usefulness as a starting point and framework for movement towards electronic legal materials.
2. Modifying UELMA to deem any electronic materials produced by a state agency (or its designee) existing on the effective date as “official” and subject to the requirements of the Act.
3. Modifying UELMA for New Jersey and mandating that each state entity/agency (or its designee) produce an official, electronic version of prospective publications that are authenticated, secured and protected.
4. Modifying UELMA for New Jersey and mandate that each state entity/agency (or its designee) produce an official, electronic version of both its historical and prospective publications that are authenticated, secured and protected.

Staff seeks the Commission’s guidance regarding which approach would be more appropriate in New Jersey, or alternatively, if it is the position of the Commission that it does not wish to pursue the project at this time. Upon receipt of the Commission’s guidance on the project’s scope, Staff will provide a more detailed analysis of the specific legal materials covered.

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24 This could arguably include reports and publications posted on the Internet pursuant to N.J.S. 52:14-20.1. In instances in which only one print version is delivered to the State Librarian, materials may quite credibly be considered an exclusively electronic publication.
Penalties for failure to comply:

UELMA does not contain any provisions imposing consequences on public entities failing to comply with its requirements. To the extent that the Commission wishes to mandate the publication, authentication, or preservation of electronic legal materials in some capacity, a penalty scheme for failure to comply may be appropriate. Several existing statutory enforcement mechanisms may prove instructive.

New Jersey’s Open Public Records Act (“OPRA”) provides for civil and disciplinary proceedings against “a public official, officer, employee or custodian who knowingly and willfully violates” its requirements.25 The penalties specified for such a violation include $1,000 for the first violation, $2,500 for the a subsequent violation occurring within 10 years of the first, and $5,000 for a third violation occurring within 10 years of the first violation.26

New Jersey’s Open Public Meeting Act (“OPMA”) also penalizes those violating its provisions. Individuals may apply to the Superior Court to void actions taken by public bodies at meetings not in conformance with OPMA’s requirements.27 The OPMA also permits the Attorney General or county prosecutor to enforce financial penalties of $100 for the first offense, and no less than $100 or greater than $500 for subsequent offenses against any person who knowingly violates the act.28

The federal government has developed another enforcement mechanism under the Administrative Procedure Act (“APA”). The APA requires that agencies provide certain information in the Federal Register for the guidance of the public.29 Consequently, “a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.”30 The U.S. Supreme Court has interpreted this provision to invalidate administrative decisions based upon an interpretive rule that the agency has failed to publish.31

The New Jersey Administrative Procedures Act requires a state agency to “make available for public inspection all final orders, decisions, and opinions, in accordance with the provisions of 47:1A-1 et seq.”32 Agencies are also required to publish a quarterly calendar of anticipated rule-making activities in the New Jersey Register.33 It is unclear whether administrative invalidation would be an appropriate penalty in instances in which an agency failed to publish its legal materials electronically but maintained print publishing required by the New Jersey Administrative Procedures Act.

26 Id.
28 N.J.S.A. § 10:4-17 (West).
30 Id.
32 N.J.S.A. 52:14B-3(3) (West).
33 N.J.S.A. 52:14B-3(4) (West).
The New Jersey Legislature has enacted various statutory mandates regarding government Internet resources without incorporating a penalty for failure to comply. While difficult to determine with certainty, it seems that in many instances the responsible agencies do comply with the statutory requirements.

Conclusion

Staff will continue research and outreach as appropriate, working toward the preparation of a Draft Tentative Report after receipt of any guidance the Commission wishes to provide regarding this project.

Appendix – Uniform Electronic Materials Act

Adoptions:

**California:** “Legal Material” pursuant to Cal. Gov. Code § 10290 et seq., includes only: the California Constitution; the statutes; the California Codes. (Long phase-in, adopted 2012, effective July 1, 2015).

**Colorado:** “Legal Material” pursuant to C.R.S. 24:71.5-101 et seq., includes, in its definition of legal materials: the constitution of the state; the session laws of Colorado; the Colorado Revised Statutes; and a state agency rule promulgated in accordance with article 4 of this title. (Effective March 31, 2014).

**Connecticut:** “Legal Material” pursuant to C.G.S.A. § 1-331 includes only the Constitution, the general statutes, the regulations of state agencies, and the reported decisions of the Supreme Court, the Appellate Court and the Superior Court. The bill’s fiscal note indicated that enactment would not result in a fiscal impact since the bill did not require the State to publish legal material electronically, but sets requirements if the State chooses to do so. (Effective October 1, 2014).

**Delaware:** “Legal Material” pursuant to 1 Del. C. § 402 includes: the Constitution of Delaware; the Laws of Delaware; the Delaware Code; and a state agency regulation promulgated in accordance with §§ 10111-10119 of Title 29. (Effective October 21, 2014).

**Hawaii:** “Legal Material” pursuant to H.R.S. § 98-1 includes: the Constitution; the session laws; the revised statutes; a state agency rule that has or had the effect of law; the reported decisions of the state supreme court and the state intermediate appellate court; and the state court rules. (Effective October 1, 2014).

**Idaho:** “Legal Material” pursuant to I.C. § 60-301 includes: the constitution of the state of Idaho; the general laws of the state of Idaho, also known as the session laws; the Idaho code; the Idaho administrative code and the Idaho administrative bulletin; reported decisions of the following state courts: the Idaho supreme court and the court of appeals; or Idaho court rules. (Effective July 1, 2013)

**Illinois:** “Legal Material” pursuant to 5 I.L.C.S. § 180/6 includes: the Illinois Constitution, the Laws of Illinois; the Illinois Compiled Statutes; the Illinois Administrative Code; the following categories of State administrative agency decisions: final administrative decisions; and reported decisions of the following State courts: Illinois Supreme Court and Illinois Appellate Court; Illinois Supreme Court Rules; or Illinois Court of Claims. (Effective January 1, 2015).

**Minnesota:** “Legal Material” pursuant to Minn. Stat. § 3E.02 et seq., includes: the Minnesota Constitution; laws of Minnesota; Minnesota Statutes; or Minnesota Rules. (Effective January 1, 2015).
Nevada: “Legal Material” pursuant to Nev. Rev. Stat. tit. 59 § 721.010 et seq. includes: the Nevada Constitution; the Statutes of Nevada; the Nevada Revised Statutes; and the Nevada Administrative Code. The bill noted that it might have a fiscal impact. (Effective January 1, 2014)

North Dakota: “Legal Material” pursuant to N.D. Cent. Code § 46-03.1-06 includes: the Constitution of North Dakota; the North Dakota Century Code; the North Dakota Session Laws, also known as the Laws of North Dakota; and the North Dakota Administrative Code. (Effective July 31, 2013)

Oregon: “Legal Material” pursuant to O.R.S. § 192.715 et seq. includes: the Oregon Constitution; session laws published by the Legislative Counsel under O.R.S. § 171.236; the Oregon Revised Statutes; or Oregon Administrative Rules. (Effective May 23, 2013)

Pennsylvania: “Legal Material” pursuant to 44 Pa. C.S.A. § 704 includes: the Constitution of the Commonwealth of Pennsylvania; the Laws of Pennsylvania under 1 Pa.C.S. § 1103 (relating to preparation of statutes for printing); the Pennsylvania Code; a Commonwealth agency regulation that has or had the effect of law; reported decisions of: the Supreme Court, Superior Court, Commonwealth Court, or a court of common pleas; rules of court; and a section “reserved” for further inclusions. (Effective November 24, 2014).

Introductions:

Maryland: The definition of “Legal Material” in SB611 includes: the Maryland Constitution; the Session laws; the Code of Maryland; the Maryland Rules; the Journal of the Senate of Maryland; the Journal of the House of Delegates of Maryland; reported decisions of the Court of Appeals or the Court of Special Appeals; opinions of the Office of the Attorney General; the Code of Maryland Regulations; a final decision in a contested case issued by a unit of the State government under the Administrative Procedure Act; and the Maryland Register.

Massachusetts: The definition of “Legal Material” in HB38 includes: the Constitution of the Commonwealth of Massachusetts; the Session Laws; the General Laws; a state agency rule or decision that has or had the effect of law; other material published in the Massachusetts Register or the Code of Massachusetts Regulations; or the reported decisions and rules of the following state courts: the Supreme Judicial Court, the Appeals Court and the Trial Court.

New York: The definition of “Legal Material” in A05631 includes: the Constitution of the State of New York; the laws of the State of New York; a state agency rule, regulation or decision having the effect of law; material published in the New York Register; the New York Code of Rules and Regulations; and reported decisions of the Court of Appeals, the Appellate Division and the Supreme Courts.

Texas: The definition of “Legal Material” in HB1799 includes: the Constitution and Statutes of Texas; the general or special laws passed in a regular special session of the Texas Legislature; and a state agency rule adopted in accordance with state law.